United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-2427-2482

(41848)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Detainees of the Brooklyn House of Detention for Men, RAYMOND MOCTEZUMA, RONALD FOY, LAWRENCE ODOM, FRANK WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, THEODORE R. WEST, Warden, Brooklyn House of Detention for Men, ABRAHAM D. BEAME, Mayor of New York City, LOWELL B. BELLIN, Health Commissioner and Health Services Administrator of the City of New York, individually and in their official capacities,

Defendants-Appellants.

RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, ABRAHAM D. BEAME, Mayor, City of New York, SALVATORE LATORRE, Warden, Queens House of Detention for Men, individually and in their official capacities,

Defendants-Appellants,

NICHOLAS FERRARO, District Attorney, Queens County,

Defendant.

ON APPEAL FROM JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX

Volume 2

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CROSS-EXAMINATION

BY MR. HERMAN:

Q Now, Warden Rubin, you have primarily double-occupancy; is that correct?

A Yes.

Q The stated capacity you said in your institution was 520?

A Right.

Q Does that include the inmates on the sixth floor dormitory area; is that correct?

A Yes.

Q What is the capacity of that?

A The sixth floor dormitory area, the rated capacity would be for 80 inmates.

Q And that is empty right now; is that correct?

A Yes.

Q Now, you also have an average of approximately 40 cells that are not in use at any one time; is that correct?

A That is approximately correct.

Q Now, you stated that you have an administrative segregation section, where is that located?

A The third floor.

Q Is it one tier, two tiers or -- it has four tiers, it is the whole floor. The whole floor is referred to as administrative segregation area, and within that

segregated area there are certain categories.

Q Do you have a punitive segregation area?

A Yes.

Q How many cells are put aside for the punitive segregation?

A Eight cells.

Q How many inmates were there this morning?

A I didn't go to the institution this morning, but I can give you yesterday morning's, I think we had three.

Q Three?

A Three was in there yesterday.

Q You have a homosexual tier? Is that correct?

A Right.

Q How many cells are there?

A Also eight cells.

Q How many of those cells were occupied?

A I believe there are ten, ten homosexual inmates at the present time.

Q Do you have any doubling up?

A Yes.

Q You also said that you have protective custody type cases, co-defendants or what have you. How many cells are put away for those people?

A We have no specific.

Q Is that administrative?

A Yes, that is administrative.

Q How many cells are put away for that?

A There are no specific numbers set aside, that there is.

We try to put them usually in number one cell up front where the officers can keep them under observation at all times.

You see, the idea of the segregation floor is that we have more officers available to observe the floor at all times.

That is why it is referred to as that.

Q How many inmates are there in the suicide observation cells?

A Right now I would estimate 15.

Q And how many cells are there?

A In 12 cells.

Q You have a third floor dormitory; is that correct?

A Yes, we have four dormitories up there.

THE COURT: Excuse me a minute.

All right, go ahead.

Q You have four dormitories on the third floor?

A Right.

Q That is for sentenced help?

A Sentenced help, it is outside on this third floor.

Q It is aside from the cell area, your administrative area?

A Right separate from the cell area.

Q Now, could I see the sheet you were referring to when you gave us the figures on how many people were participating in different programs and also your description of the programs?

(The witness indicated documents.)

Q That is the description, do you have the rosters?

A What rosters.

Q Where you got the figures from.

A Yes.

That (indicating) is the monthly reports of those outside programs. That is where some of the figures came from.

Q Where do the other figures come from?

A Our report from the -- from the Recreation Department, et cetera, and these are the figures on the Law Library (indicating documents).

Q Thank you.

This has been marked as Defendant's Exhibit D. Now, isn't this a master list for the whole city, of every one that has --

A No, that is the list for the Queens House of Detention, plus there are a number of city-wide programs, they go into every institution so therefore --

Q These are people that have correction agency passes; is that correct?

A Right.

Q And this does not list when they have come in; is that correct?

A No, no.

Q This list lists people who are eligible to come into your institute; is that correct?

A Right.

Q O.K. Thank you.

THE COURT: Well, there is a column on there about visits. Do you have another set of print-outs on which that is listed?

THE WITNESS: No -- yes, that would be another set of figures, that would be the monthly reports of outside people that come in, that signed in, the other set of reports he has there.

MR. HERMAN: Which is that one?

THE WITNESS: That is this one here (indicating).

MR. HERMAN: O.K., good.

THE WITNESS: It shows the number of people in

attendance.

MR. HERMAN: The number of people in attendance refers to the number --

THE WITNESS: This is the report on high school equivalency.

MR. HERMAN: The number of people in attendance refers to the number of people on programs that come in during the month?

THE WITNESS: Yes, the number of people that come in during the month.

THE COURT: Do you want to take five minutes to look at those documents?

MR. HERMAN: Yes, sir.

THE COURT: You may want to offer them or have them marked for identification, that is, unless you are going to give them right back.

Well, we will take a short recess.

(Whereupon a 10-minute recess was taken.)

(Continued on next page.)

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ARTHUR RUBIN, called as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified as follows:

THE COURT: All right. Go ahead, Mr. Herman.

CROSS-EXAMINATION

BY MR. HERMAN:

Q Warden, you testified on direct examination that the art class last month served 12 inmates; is that correct?

A Right.

Q You also testified that the high school equivalency program served 23 inmates?

A Yes.

Q You testified that the English, as a second language, program sericed 10 inmates?

A That's the average class group size at the times they meet.

Q You testified that the drama class held 12 people at six and six?

A Right.

Q Now, and you also testified that the Ethical Culture program served 81 inmates. That was during the whole month?

A Right.

Q Now, isn't it possible and probably probable that there were duplications among the inmates, that these aren't 81 different inmates that went to the Ethical Culture program?

A Right, it could be --

Q And the high school equivalency program, there were 23 inmates per class you said but that the same ones would go to several classes?

A Right.

Q That would hold for all of them; is that correct?

A Correct.

Q And aside from high school equivalency, English as a second language, the drama class, the other programs are primarily counseling and help with the criminal case or family matters?

A Right.

Q Now, where -- the classes all meet on the seventh floor; is that correct?

A Right.

Q And the classes only meet only during lockout hours?

A Right.

Q You mentioned the welfare liaison committee,

Warden.

Isn't it true that that program helps time people who are on the -- sentenced people who are about to get out?

A Sentenced-- it would also help a detainee who is about to get out.

Let's say he says: I'm going to Court tomorrow. My lawyer tells me the case is going to be dismissed. I need some help when I hit the st[illegible].

Or you get a man coming down from upstate prison who know he's won his appeal or something, the Judge is going to re-sentence him and chances are he'll get discharged. He can start setting up his liaison through our institution with the welfare people.

Q It's not, though, for your long-term detainee, your average detainee, who spends a significant amount of time?

A Yes, it would be, in cases not directly affecting him, let's say, his family is having a welfare problem. It would be for him also, then.

Q You testified that choir practice is on Wednesday. Do you know for a fact that it meets every Wednesday?

A It's scheduled every Wednesday.

Q But you don't know, you haven't gone up there every Wednesday and seen that it meets; is that correct?

A No, I haven't gone up there every Wednesday. No.

Q You stated that you have a new law library and that is also on the seventh floor.

A Also on the seventh floor, yes.

Q And that also is available for inmates only during lockout time; is that correct?

A Correct.

Q You stated that 241 inmates used the law library during the last month. This also includes some inmates that have gone more than once; is that correct?

A Correct.

Q You stated there was an inmate newspaper called The Link, and that there are seven inmates who work on the paper.

A Right.

Q Do you know that the staff has seven members now?

A I believe one man has recently been discharged, I think it was last week.

Q When a man works on the newspaper, how many times -- how often can he, you know, work on his newspaper

business?

A They are usually up there every day during lockout periods.

Q In other words, he can be up there every day during the lockout periods if he so chooses?

A Right. But not for the evening lockout period.

Q During the daytime lockout period he can --

A During the daytime lockout period, right.

Q You said that you have time men at the institution, sentenced men?

A Sentenced men.

Q What chores do they do?

A They perform the heavy kitchen duties, maintenance work --

Q What is heavy kitchen duties?

A In other words, the actual main kitchen duties, they actually perform the preparation of food as compared to the detainees on the floor who serve the prepared food.

Q Do you have any detainees doing any of the cooking?

A No.

Q What else do the sentenced help do?

A Maintenance work and sanitation areas of the housing floors.

Q Do you consider you institution to be overcrowded?

MR. TOBIAS: Objection.

THE COURT: Overruled.

THE WITNESS: It's a matter of degree.

Q Is it overcrowded?

A It's above rated capacity.

Q Were the cells in the institution built for one man or two?

A They are built for one man.

Q And most cells have two men in them?

A Right.

Q You said also that you worked for a long time in Brooklyn; is that correct?

A Right.

Q Is there appreciable differences between the Brooklyn institution and the Queens institution, as far as the inmates you served, the detainees you serve?

A No. Basically it's the same, except the Brooklyn institution is much larger. It has more housing floors --

Q In terms of the people.

A People are basically the same.

Q People are basically the same?

A Right.

Q You stated that the inmates go to the gym once a week?

A Right.

Q You don't consider that sufficient, do you?

A It's what we can provided.

Q Would you like to provide more?

A Oh, I'd like to provide much more.

Q How much would you like to provide? How much do you think would be good?

A Well, let me say this: There is no real set statistic or anything I can give you, but let me give you my own experience.

I have found that at one time in the history of our department, we used to compel people to go to the gymnasium and quite frankly, it went over very flatly. The inmates resented it.

Now that we allow them to go, freedom of choice, the gymnasium gets very little use as compared to what we have, so even though I'd like to provide more, there is not that much popularity --

Q For the people that want to go, how many

times a week -- would you say once a day would be a healthy thing for your institution?

A No, I would say twice a week would be healthy for my institution, because it wouldn't interfere that way in other programs.

Q Well, no, this is assuming that you have enough staff and enough space, would it be desirable to have, you know, more gym?

A Oh, sure.

Q Now, you testified to, you know, the several education programs you have, and you have a lot of outside agencies, the clergy, welfare, you mentioned. Do you favor this?

A Yes, I do.

Q Why?

A Because I feel that the outside community participation helps the inmates' morale.

Q How?

A Well, he gets a chance to relate to people from the outside world. He knows that people in the community are interested in him. He feels he has somebody to appeal to versus the administration, for example. He feels that there is some link, that all hope for him has not gone down the drain, that he feels -- just having somebody other

than a correction officer or an employee of the department to talk to is important, and somebody, you know, who he may know lives in his own neighborhood or near his neighborhood -- let's say there are a number of guys who are ex-offenders in these drug programs, knowing that he sees somebody who was in his position one time and has now made it, made something of himself, so there is a chance for him. It aids his morale.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. HERMAN: (Cont.)

Q So it's good for men to participate in these programs?

A Yes, it's good for men to participate.

Q Is it also, in terms of the gym and in terms of going to the classes, you would consider it good that the men move off the floor, also?

A Yes.

Q You do not -- we have had testimony that as much movement as you can have within the institution, which is consistent with keeping a secure institution, is good for the inmate, that the more movement, or the less boredom the better; would you agree with that?

A Not entirely. I would agree only within what the capacity for the institution, what it is able to provide.

Q Given that, given your security limitations --

A Yes.

Q -- is as much movement as your staff allows, your physical plant allows, is that healthy, is good?

A Yes.

Q Why is that?

A Because it provides a breaking in the boredome of incarceration. It gives the inmate something to do. For

all of us movement about is good for our circulation, for our general health. It's good to provide a little diversion from the ordinary routine of the day.

Q If you had more space at Brooklyn --

A Queens.

Q In Queens, I'm sorry. If you had more space in Queens, and you had more staff, that is if the City gave you more money, could you do more in terms of programs?

A Yes.

Q In terms of activity?

A Yes.

Q And you would consider it good for your inmate population?

A Yes.

Q And you favor it philosophically; is that correct?

A Yes.

Q The Queens House of Detention is a maximum security institution; is that correct?

A Correct.

Q You testified that the morning lock-in from 11:00 to 1:00 -- 11:00 to 12:45, during that time the officer takes a count and the lunch is served and the men clean up.

Is it because of the time it takes to take

it down, clean up and serve the food that the men are locked in for the full two hours, as opposed to just the time when they eat?

A Yes. In other words, because of those procedures going on.

Q Now, if you were down to single occupancy and you still had the same percentage of men going to court, would you be able to do this process any faster -- you would be able to do it a little faster, wouldn't you?

A A slight bit faster, yes.

Q Now, potentially -- your tiers were built for 15 men, is that correct?

A Right.

Q And you sometimes have 30 men there?

A Right, but it's still only 15 cells.

Q But it's still two trays to carry?

A Right.

Q So if the population were down things could be done faster and conceivably the lock-in time during that meal could be shortened?

A Not significantly, counselor.

Q Now, prior to the Queens' riot the men used to eat in the -- in what is now the seventh floor activities room; is that correct?

A Correct.

Q Do you approve it -- let me ask you, which do you prefer, do you prefer a situation in which the men eat in their cells -- it's been described some men eat on their beds, some men eat at the little desk, some men eat standing up, some sit on the toilet when they eat, some men take turns, do you --

MR. FRIEDMAN:: I object to the phrasing of the question as to which he does prefer.

THE COURT: I assume the preference will be based on professional judgment. I will permit it.

Q Is it a good practice for men to eat in their cells?

A Well, let's say there are certain advantages to it.

Q Is it a preferred practice --

THE COURT: Let him answer.

THE WITNESS: Well, let me say this: At one time, going back to my experience at the Brooklyn House of Detention, we fed inmates in the dayrooms and we had to rush the men through their meal because of the fact that there was a hundred and twenty or a hundred and fifty men on a floor that had to eat, and the dayrooms, the capacity in them wasn't

that great. We had to feed them in shifts. There was a natural pressure on the inmates, hurry up so the next group can get in there.

BY MR. HERMAN:

Q Let me stop you for one second. So are you saying that theproblem in Brooklyn, because you had to rush, you had to eat in shifts, was primarily though because of the gross overcrowding that was the condition in Brooklyn.

You were there during the worse --

A Even if the floor was on capacity, even in Queens, the dayrooms are not built to hold the entire floor in the dayrooms all at one time.

Q If you had the space, would it be preferable to have the men eat in the cells?

A Yes.

Q Why?

A Well, better observation on the part of the officers and better for the inmates' morale.

Q So in other words, it's good from the inmates' point of view and good from a security point of view?

A Yes.

Q I assume it's also good from a sanitation point of view so you don't have people spilling stuff all over their cells?

A Not significantly, counselor, there is still a santitation problem whether they eat in the cells or in the dayrooms. It's a matter of personal habits, quite frankly. It's a situation where -- let me be frank about it, the inmate is there, he has no real invested interest in the institution. He's there against his will. He's furnished with a candy bar, he throws the wrapper onto the tier. Sanitation is an ongoing thing which we accept.

It is not a situation where that little food spillage is going to make a tremendous difference in the sanitation as compared to them eating in the dayroom or in the cells.

Q You testified that during the lunchtime lock-in you have one of the supporting officers from , I think you said the activities officer, who can come and cover for the regular officer while the regular officer goes to lunch and then the men can come out of their cells a little earlier.

In the evening you don't have the support staff and that accounts for the longer lock-in, along with the fact that it is a bigger mean; is that correct?

A Yes. Also there is another factor in the evening procedure with breaking the shift. There is an oncoming shift and an offgoing tour and the procedure for the count is a little bit more complicated. The count is actually

taken twice, one officer has to verify what the other officer has done because he's assuming responsibility for that floor.

In addition, he has to be advised by that other officer as to any conditions on his post which may exist prior to his going off duty, so there is a significan't administrative difference there.

Q At 3:00 o'clock the men are locked in?

A 3:15 they start to lock in.

Q 3:15 they are locked in. When does the new shift come on?

A The new shift comes on a quarter to 4:00.

Q So what is done --

(continued next page.)

THE COURT: Just a minute, please.

THE WITNESS: I am sorry, let me correct that. The oncoming --

Q Wait for the Judge, please.

THE COURT: All right, go ahead.

Q Warden, you were going to say something?

A I want to correct that. I meant the oncoming shift reports at 3:30.

Q The oncoming shift reports at 3:30?

A Right.

Q The men are locked in at --

A 3:15.

Q Now, if you had four men, if you were down to stated capacity in each of your sections, and you had more staff that could cover, you know, could cover the counts, so there wasn't -- and could observe the men during a shift change, you know -- Do you have an overlapping shift?

A Yes, we have an overlapping tour.

Q Are they on the floors while the shift change is taking place?

A Right.

Q What are they doing?

A Also they are participating in the count, and they are making, you know, their routine patrols.

Q How many officers do you have on the floor at 3:15?

A The average is two. On the observation floor, it's three.

Q On the regular housing floor, it's two?

A One is a regular shift man, and one is a split-shift man.

Q How long does it take for him to do the count? I think you said about twenty minutes?

A About fifteen or twenty minutes.

Q And then the first shift man, I guess that's about the time when he'd go off duty?

A No, he has to be actually -- There has to be an actual relief. The oncoming shift comes on the floor.

Q At what time?

A It gets there, let's say, about twenty to 4:00, twenty-five to 4:00.

Q Okay. He comes on, and the first man goes off?

A Right.

Q The new man takes a count?

A Right. He takes a count, and then he has to compare his count with one that -- with a slip that's been prepared by his relief.

Q The men aren't locked out during the two counts,

is that correct?

A There may be a few inmates out sweeping up, et cetera.

Q The help?

A A couple of the help sweeping up. There is always something at the last minute.

Q What time is dinner served?

A Approximately 4:30. That's the inmate's meal.

Q What time does the officer eat?

A They start at approximately the same time. The split-shift man would leave the floor now, upon the arrival of the oncoming shift, so he can go down and get the evening meal.

Q So then you would be left with one man on the floor during this time?

A There are two men. The oncoming guy and the offgoing guy, two men.

Q The clean-up takes approximately fifteen or twenty minutes?

A They usually -- What the inmates do after the food trays are all collected, one man will go down the tier with a broom, another man will follow him with a mop, and they don't do the cells. The cells are the individual responsibility of the individual inmates living in that cell.

Q Warden, you testified before that the more move-

ment, or I imagine, freedom that security allows, the better for the inmate: is that correct, and better for the security, because tension is kept down; is that correct?

A Yes. Although the two never go together 100 percent perfectly, in most cases it helps.

Q In most cases it helps?

A Right.

Q Now, how many officers do you have on your floors during the 6:00 to 9:00 o'clock lock-out?

A You mean the 5:45 to 10:00 o'clock lock-out?

Q Right, the evening lock-out.

A On the regular housing floors, we have two men, and on the special floors we have three men.

Q Warden, if you had more officers who could control -- You have catwalks outside the corridors, facing the cells, is that correct?

A Right.

Q If you had more officers who could regularly patrol one tier or one section more often than I imagine your two officers can, wouldn't that make it possible to leave the cells open during lock-out?

Wouldn't you have more observation possible? Isn't observation a major problem?

A Yes.

THE COURT: What's your question?

Q Wouldn't it be possible to have a more -- to possibly have, you know, the cells open, if you had a man regularly patrolling there who could see what was going on in the cell?

A Yes. Then you could possibly do that, yes.

Q You could?

A But it would be a fixed post.

Q Absolutely. But it could be done if you had the personnel?

A Yes.

Q And would you think it would be preferable, assuming again that you have the personnel, that a man could have the choice of staying in his cell, or leaving it to go to the dayroom or the corridor or stay in his cell?

A With sufficient numbers of personnel, yes.

Q Yes.

THE COURT: What would you need, three instead of two?

THE WITNESS: No, your Honor, we have an upper and a lower tier, and as it is now, it's very difficult -- What counselor is referring to are the catwalks that we have for the officers to make their patrols. We would have to have a man for each tier to properly safe-

guard -- to leave the cells open.

THE COURT: You can't see from the upper tier down to the lower?

THE WITNESS: You can, but it's not that good an observation.

THE COURT: So how many would you need in place of the present two?

THE WITNESS: I would need -- I would say my estimate would be eight additional officers to do the thing properly.

THE COURT: All right. Do you want to pursue that, Mr. Herman, or do you want to go on to something else?

MR. HERMAN: I want to go on to something else, unless your Honor has another question.

THE COURT: Go ahead.

Q You stated that most of your detainees are from -- give Queens addresses, is that the case?

A Right.

Q When they come into your -- Let me just go ahead a second. You stated that the detainees wear their own clothing; is that correct?

A Right.

Q And the families can bring in clothing twice a

week during the visiting?

A Right.

Q Now, where do the inmates -- Are there any facilities for the inmates to wash their clothes in the institution?

A Only their sink inside of their cells.

Q The sink in the cell?

A Right.

Q Where do they dry their clothes, do you have a dryer on the floor?

A No, we don't have dryers on the floor. They usually hang them up on the cell bars, or they string up a little clothesline inside of the cell.

Q Have you had any homosexual attacks in your institution?

A No.

Q None?

A None.

Q Did you have any in Brooklyn?

A Yes.

Q You stated before that every day you have officers breaking up fights. Do you have inmates fights during the day?

A Yes.

Q At times?

A Yes. Fights break out among the inmates. I

wouldn't say each and every day, counselor; let me qualify that. But I was using that to illustrate the thing with observation, and why officers -- you know, officers must be present and observe what is going on.

Q Now I'd like to get your classification system that you have described?

A Yes.

Q You have your medical and psychiatric floors. Would you go over it again? When a man comes in, how is it determined that he goes to a medical floor?

A He's examined -- Each new admission is examined by a doctor prior to his being sent to a housing floor. Part of the admission procedure calls for a medical examination. That doctor may make some observations by speaking to the inmate, and also his own personal observations.

For instance, what I mean by medical, is usually either psychiatric or, let's say a man may come in and have some kind of specific medical condition which we would require to segregate the man temporarily from the rest of the institution; for instance, maybe some sort of communicable disease.

I have not experienced it in a number of years, but this is one of the considerations that is given. The basic thing is, number one, if he has a previous mental history, or if he has a suicidal --

Q Where do you find the information out about previous mental history?

A By questioning the inmate.

Q You can find that out. Now, when they come in, do they have -- do you get a yellow sheet; is that correct?

A It's called -- It used to be referred to as a yellow sheet. It was a Police Department form. Now New York State has taken that over, and it's called a New York State Identification Information Sheet.

Q What is on this sheet, specifically?

A All previous offenses that the man has been arrested for, and he's been subjected to fingerprinting for; previous criminal offenses.

Q Does it state whether or not he has been convicted of the crime?

A In most instances, it will. In some cases, it is missing.

Q Does it state if a man has served time upstate?

A Yes.

Q It does?

A Yes.

Q Does it tell you the state where they served the time; in other words, if a man is from out of state, or whatever?

A Right.

Q Does it give you any other information about the man?

A Well, the charge, the authority and the agency that made the arrest, or who fingerprinted him at the time.

THE COURT: I think we'd better take our noon recess now.

Let me ask how much longer you expect to be with the witness?

MR. HERMAN: I expect around a half hour, your Honor, forty-five minutes.

THE COURT: I had Dr. Kinzel due to come back. How long do you expect to be with him, Mr. Friedman?

MR. FRIEDMAN: Forty-five minutes to an hour, your Honor.

THE COURT: I have four matters on at 2:00, so I can't start before 2:30. I don't know whether it does Warden Rubin any good if I let him come back at 3:00 o'clock or so.

Can you get back to Queens and do anything?

THE WITNESS: Not really, your Honor.

THE COURT: I don't know what else to do. We ought to get Dr. Kinzel finished.

MR. FRIEDMAN: If the Warden would prefer to come

back tomorrow morning, we can prevent --

THE COURT: I can't do it tomorrow morning -- I might be free by 11:00 o'clock tomorrow. I don't like to bring the inmates back too many times.

MR. FRIEDMAN: Which would you prefer, Warden? Would you prefer to wait around here?

THE WITNESS: Whatever is convenient to the Court, your Honor.

THE COURT: I think it's best from the point of view of continuity to finish you today, and keep you here, and get Dr. Kinzel out of the way first, because he was interrupted.

We will resume at 2:30.

(Luncheon recess.)

gA
1 PM

AFTERNOON SESSION 114

January 24, 1974

2:45 o'clock P.M.

THE COURT: All right, Dr. Kinzel is here. Let us finish with Dr. Kinzel.

A U G U S T U S F R E D E R I C K K I N Z E L , having been previously Sworn, continued to testify as follows:

THE COURT: All right, Mr. Friedman.

CROSS EXAMINATION

BY MR. FRIEDMAN: (continued)

Q Dr. Kinzel, if I am not mistaken, yesterday when we adjourned, we were discussion the extent of your visits to the two institutions, and the particulars thereof.

Now, when you visited the roof area of the Queens House of Detention, were any inmates on the roof at that time?

A ~~No.~~

Q And when you visted the chapel, were there any inmates in the chapel?

A Yes.

Q Did you speak with any of the inmates in there?

A No.

Q When you visited the dormitory area -- How much of your time was taken measuring that area, and this is at the Queens House of Detention.

A In the Queens, about ten minutes.

Q That was your total time in the dormitory area?

A That was my time measuring the area.

Q You also testified yesterday you spent ten minutes in the dormitory area, are you now --

A I don't remember the exact intervals of time, I am merely guessing.

Q And when you visited the recreation area, were there any inmates present there?

A In the recreation area --

Q In the recreation area of Queens House of Detention, I think you said --

A On the roof?

Q No -- Well, was that the same -- You had mentioned that you spent five minutes on the roof, five minutes in the chapel, ten minutes in the dormitory, and ten minutes in the recreation area -- I am sorry, in the receiving area, my abbreviations failed me, were there any inmates present in the receiving area when you visited that area?

A None that I talked to, there may have been one or two there.

Q And the Brooklyn house of Detention, you spent one hour in the cell area, and how much of that time was taken up in your measurements?

A About the same.

Q Which is?

A About ten minutes.

Q How was the rest of that time spent?

A In discussing the conditions with the Deputy Warden and with some of the inmates.

Q How many inmates did you talk to at the Brooklyn House of Detention while you were in the cell area?

A Personally, I talked to about three or four, I overheard other conversations with several more.

Q And how long had you spent talking to the three or four inmates collectively?

A Ten minutes.

Q Ten minutes for the whole group?

A Yes.

Q And did you visit any other areas at the Brooklyn House of Detention in which you saw other inmates?

A Yes, I visited the chapel and --

Q And did you talk --

A And the mental observation ward.

Q How long did you spend in the chapel?

A A few minutes.

Q And in the mental observation ward?

A Spent about fifteen minutes in the mental observation ward, and then spent some more time talking with one of the

psychiatrists that works there on a part-time basis.

Q And when you visited the chapel and spent a few minutes there, did you talk to any inmates who were in the chapel at the time?

A No.

Q Have you ever conducted a psychiatric examination of any inmates who had previously been incarcerated in the Queens House of Detention or the Brooklyn House of Detention to determine what the affect of that incarceration had been on that particular inmate?

A No.

Q And while you were in the Queens House of Detention, you spent ten minutes in the housing area, and you spoke to various inmates; is that correct?

A Right. I spent more than that in the housing area.

Q Twenty minutes in the cell area -- I am sorry, ten minutes of that was measuring, and I imagine the other ten was talking to the inmates.

So then, when you said that deterioration --

A The other ten was waiting for the Warden, who was speaking to some of the inmates.

Q All right.

A I frankly had had enough at that point, that was

late in the day.

MR. FRIEDMAN: Could I move that that last remark be stricken, "I frankly had had enough," I ask it be stricken.

THE COURT: I will let it stand.

BY MR. FRIEDMAN:

Q Now, when you had testified that there was a certain deterioration of habits obvious at the Queens House of Detention and the Brooklyn House of Detention, such as less cleanliness, you really don't know what the habits of these inmates were prior to that time, do you, Dr. Kinzel?

A You could observe what their habits were --

Q Yes, you could observe what their habits were at the time you were present, but in order to know that, a determination had to be made as to what their habits previously had been to their incarceration, and in fact you didn't know that, did you, Dr. Kinzel?

A Not those inmates, no.

Q And also, when you testified that you had observed certain inmates pacing back and forth, and that this was caused from the conditions imposed upon them at the Queens House of Detention, you did not determine that as a result of any psychiatric examination of those inmates, did you, Dr. Kinzel?

A No, but it was identical to those that I had examined previously.

Q Isn't pacing a normal human reaction to tension and stress?

A No.

Q It isn't?

When would one pace, isn't it a normal human reaction to anxiety?

A No.

Q It is not?

The only reason that would cause one to pace is because he had his buffer zone infringed upon, is that the only reason that a person would pace around?

A Well, there is pacing and there is pacing --

Q Well, other --

A Let me put it this way, the automatic pacing of the individuals that I saw, and I have seen many more do it in other prisons, which is why I didn't take much pains to examine these men, is of a very automatic, stereotype kind of pacing. It is not the fidgety, nervous pacing of someone who may be feeling apprehensive about something. Actually, the usual response to anxiety is to withdraw and not become hyper-active, it is to become hypo-active, which means less active --

Q Then no person who was --

A This kind of pacing was very typical of the stereotyped back-and-forth movement which is almost indistinguishable from that of a lion in a zoo.

fls

(continued on next page.)

1/2 EK/elc

Kinzel-cross

Q I'm asking you, is the only reason, is the only explanation for that pacing the fact that a man's buffer zone has been infringed upon, and when a man's buffer zone has been infringed upon, he is excited to this particular pacing which exclusively exists as the result of having his buffer zone infringed?

A No, I don't believe the pacing is due to his buffer zone being infringed upon, I believe the pacing is due to being caged.

Q So therefore, any person may be likely to pace?

A Correct.

Q Now, you stated that one result or some of the results of having the body buffer zone infringed upon could be alienation, withdrawal and despair; is that not so?

A And prolonged exposure to any stress, yes.

Q But isn't it true that you cannot -- you cannot specifically state that any particular inmate incarcerated in the Queens House of Detention or in the Brooklyn House of Detention has suffered from alienation, withdrawal or despair as a result of that incarceration, can you?

A Not specifically those inmates, but I have examined hundreds before under the same circumstances, and--

Q I am directing you to the Queens --

THE WITNESS: Your Honor, I assume I'm here to

give my expert opinion.

THE COURT: Right, but you just have to answer questions and not volunteer, Dr. Kinzel.

THE WITNESS: All right, sir.

BY MR. FRIEDMAN:

Q You also stated that some other results of a person having his body buffer zone infringed upon is to cause panic and hostility; is that not correct -- or to cause latent homosexuality to become overt?

A That is true.

Q And is it also true that you cannot specifically state that incarceration at the Brooklyn House of Detention or at the Queens House of Detention has caused any of the inmates therein incarcerated to panic or to have their latent homosexuality become overt?

A No, I didn't examine any inmates there.

Q Thank you.

Now, you stated that you spent some time in Springfield and that is wherein you conducted this study?

A Yes.

Q Do the inmates incarcerated therein represent a cross-section of the total Federal prison population?

A I believe they are, essentially.

Q Isn't it really true that only the most

3 Kinzel-cross

disturbed and the known violent inmates and those with medical problems are incarcerated at Springfield?

A No.

MR. FRIEDMAN: Excuse me, your Honor.

Q Dr. Kinzel, out of the 500 or 600 inmates in Springfield when you served there, how many were mental problems?

A About a third.

Q A third?

Re -- referring you to the time when you testified in the RHEM case before Judge Lasker, page 345, was the following question propounded to you and did you give the following answer:

"Question: Out of the 500 or 600 prisoners, how many of them were mental problems?

"Answer: About half."

Was that question propounded to you and was that your answer, Dr. Kinzel?

A Well, I do not recall it.

Q Was that question propounded to you and was that your answer: Yes or no?

THE COURT: He says he doesn't recall.

THE WITNESS: I don't recall.

Q Thank you.

4 Kinzel-cross

THE WITNESS: If you would like, I would be happy to explain the discrepancy.

MR. FRIEDMAN: Well, your counsel, if he would like to ask that, that is his prerogative.

BY MR. FRIEDMAN:

Q Does the United States Medical Center in Springfield house inmates from all over the country?

A Yes.

Q Out of the 14 subjects used in your study, how many came from New York City?

A I don't recall.

Q Well, isn't it true that none of them came from New York City but one possibly came from Long Island?

A I don't recall.

Q You don't recall.

Well, maybe it will refresh your recollection if I showed you your testimony in the RHEM case.

Well, I can't find it.

THE COURT: All right, we will assume there weren't many from New York City among them.

Go on.

BY MR. FRIEDMAN:

Q How many of your subjects when you conducted your body buffer zone study were detention inmates?

A There?

Q In fact, weren't they all sentenced prisoners?

A Yes.

Q Now, in an article entitled, "Body Buffer Zone in Violent Prisoners," by yourself, Doctor, published in the American Journal of Psychiatry, July, 1970, you indicated there that over a period of time, even the most violent inmates become somewhat accustomed to closeness and therefore reduce their b ffer zone: is that not correct?

A I believe I reported in my study that after repeatedly approaching them weekly, performing the same procedure each time, each week, that I did notice that their body buffer zones began to diminish, and that the zone at the end of 12 weeks was about half the size, and this was under the conditions of being approached by an experimentor, a physician with a white coat, this is not under conditions of being housed in a tiny cell --

Q Does that mean that the most violent, that even the most violent inmate can have their buffer zone reduced and --

A Under those circumstances.

Q Under any circumstances?

A No, it doesn't mean under any circumstances.

Q Doctor Kinzel, referring you again to the

testimony you gave before Judge Lasker in the RHEM case, page 379 thereof, were the following questions propounded to you and were the following answers given by you:

"Question: In that article, Dr. Kinzel, you indicated that over a period of time, even the most violent inmates become somewhat accustomed to closeness and therefore reduce their buffer zone?

"Answer: Yes, yes.

"Question: Does that mean that even the most violent individuals can become accustomed to closeness?

"Answer: Less sensitive to it."

Now, Dr. Kinzel, were those questions asked and were those answers given by you?

A I would assume so; I don't recall.

Q So does that mean that even the most violent individuals can become accustomed to closeness?

A Under certain circumstances.

Q But at the Rhem case, you said, "Less sensitive to it," now you are saying, "only under certain circumstances;" is that correct?

A My meaning was the same, whether I said one thing or the other at that time or now, my meaning was obvious that under less stressful circumstances, the tendency would be to diminish: All I know is what I found.

7 Kinzel-cross

Q Isn't it a predictable human reaction that individuals who become accustomed to closeness after a period of having been subjected to close quarter s and close surroundings are at least less sensitive to that closeness?

A From my studies,I would infer, and it would be an inference, that nonviolent people would adapt to the increased closeness, whereas violent people would have much more difficulty doing so.

Q Have you ever conducted a body buffer zone study similar to the one that you described by using subjects who all came from New York City?

A No. I attempted to and that request was turned down.

(continued on following page)

Q You attempted to, and that request was turned down?

A Yes.

Q Why did you attempt to do it with people who all came from New York City?

A I attempted to do so with people who came --

Q Why, why?

A Well, for practical reasons, I was working at Columbia, I didn't want to go out of town, or do it anywhere else, I thought I would do it here.

MR. FRIEDMAN: May I have this marked for identification, please?

THE CLERK: One-page document, marked as Defendant's Exhibit G for identification.

THE COURT: I have another matter for a few minutes.

(A five minute recess was taken.)

THE COURT: All right, continue, Mr. Friedman.

BY MR. FRIEDMAN:

Q Dr. Kinzel, I show you a roughly-constructed diagram, one side of which is marked "A," and one is "B." One shows two circles, and the imaginary diameter of these circles, well, each is between four and five feet.

I ask you, if the normal average inmate were in

situation B, assuming the diameter again to be four and a half feet, would that be what you mean when you are saying there is "intrusion on the body buffer zone"?

A Yes.

Q And in the situation in diagram A, would those people not be having, assuming that the people were these dots, would those people not be having their body buffer zones infringed upon?

A That is correct.

MR. FRIEDMAN: Your Honor, I move to have this entered into evidence as Defendant's Exhibit G.

MR. GERITY: I would like to take another look at it.

I have no objection.

MR. FRIEDMAN: No objection?

THE COURT: It may be marked.

THE CLERK: Defendant's Exhibit G, marked in evidence.

BY MR. FRIEDMAN:

Q Now, Dr. Kinzel, you have testified that the cells at these two facilities in question were not adequate to house two inmates, and when you did so testify, were you referring to the inadequacy with respect to your body buffer zone theory, or to the adequacy with respect to your body buffer

zone theory.

A I thought they were inadequate.

Q And you also stated that there were twenty square feet of space available to move around; is that not right?

A Yes, yes.

Q And it was that figure of twenty square feet that you used in determining that they were inadequate?

A That is correct.

MR. FRIEDMAN: May I have this marked for identification, please?

THE CLERK: Diagram marked as Defendant's Exhibit H for identification.

BY MR. FRIEDMAN:

Q Dr. Kinzel, I show you another rough diagram marked Defendant's Exhibit H for identification.

This diagram shows a rectangle which is five inches by eight inches. There are also two letters in there representing people, persons X and Y.

Now, assuming that each of these inches was a foot instead of an inch, it would show a rectangle five feet by eight feet.

Now, is it not true that people X and Y under your radius which you gave as four feet in the Rhem testimony would not be infringing upon each other's buffer zone require-

ment, assuming that this is one foot (indicating), two feet (indicating), three feet (indicating), four feet (indicating).

Now, if a buffer zone has a diameter of four feet, isn't it true that those people are not infringing upon each other's buffer zone requirements?

A Yes.

In this diagram with the person standing up against the bars, is, I assume, what you mean?

Q Towards the back of the cell.

A This is the back (indicating).

Q Assuming that to be the back.

A And the other one is up against the front.

Q Almost five and three-quarter feet.

A Is there enough to leave five feet between them, is that what you are asking, am I correct?

Q I'm asking, would that infringe upon their body buffer zones if they were normal inmate population, and could they not stand in those positions in an area of five feet?

A Is this the cell, or is this just any area?

Q Well, let us assume it is any area.

A Any area, yes.

Q And if it is a cell?

A Well, then, we have to take where the toilet is--

Q Why do we have to take into consideration where

the toilet is?

THE COURT: Let us not ask that --

MR. FRIEDMAN: Your Honor, I think this is important --

THE COURT: The answer is obvious.

MR. FRIEDMAN: I don't think it is, your Honor, Dr. Kinzel testified --

THE COURT: If you have two cots and a table, so you have much less room in the cell than if you had a bare room.

MR. FRIEDMAN: But Dr. Kinzel testified yesterday that there was no proof that an inmate's objects infringe upon a person's body buffer zone.

THE COURT: It leave less space to walk around.

MR. FRIEDMAN: Your Honor, may I say --

THE COURT: Let us go on to something else.

MR. FRIEDMAN: Your Honor, I have to take strong exception to this, Dr. Kinzel has stated that in accordance with his body buffer zone theory, and he himself admitted, there was no evidence to show that an inanimate object affected inmates in the slightest.

THE COURT: He didn't say, "in the slightest."

MR. FRIEDMAN: Your Honor, I will read his testimony back from yesterday.

THE COURT: Let us not spend more time on this.

MR. FRIEDMAN: Your Honor, I think this is a crucial point, the man has stated that he thinks it is inadequate, but really, based on his own statements, it is adequate.

Now, if that is not a crucial point, then I will go to another one. But I do request that I be permitted to read it.

THE WITNESS: May I make a statement?

THE COURT: Yes.

THE WITNESS: I believe I testified that I had no evidence that in prisons they --

MR. FRIEDMAN: We are talking about a cell.

THE WITNESS: We are talking about people, these are people just like you and me who are accused of crimes, and we are assuming that they are like other people, and it has been shown that physical surroundings affect them.

MR. FRIEDMAN: I don't want to assume anything, I want to know the facts.

THE WITNESS: I don't want to leave the impression that I testified that I don't think the inanimate objects didn't affect them, I would assume that they did.

MR. FRIEDMAN: You would assume they did, but

7

yesterday is it not true that the following questions were asked of you, and you gave the following answers:

"So I ask you again, Dr. Kinzel, --"

THE COURT: What page?

MR. FRIEDMAN: 42, your Honor.

"(continuing) -- is there specific data which supports the conclusion that inanimate objects would interfere with a person's buffer zone to the same extent that another person might?"

And your answer was:

"Not in prisons."

"Is that not true?"

"Answer: Not in prisoners."

"Question: All right, not in prisoners."

So therefore --

A There is no specific --

THE COURT: That is not a statement that standing against the wall does not in the slightest upset a person who has to stand there in order to get away from his cellmate, it seems to me you were rather inaccurate in your description of the testimony.

(continued on next page.)

Kinzel-cross

Q Do you know whether or not in prisons an inanimate object will interfere with a person's body buffer zone, Dr. Kinzel?

A I believe I answered the question.

Q Well, aren't there those in the psychiatric community who think that people will find comfort in solid objects?

A There are some people that find some emotional comfort in objects such as rabbit feet and familiar chairs, something like that; is that what you mean -- familiar areas? But I don't think that that is the issue here which we are talking about.

Q Well, isn't it true that the impression made is that the sense of a solid object behind someone with a large sense of personal space is comforting?

A It might be --

Q Isn't it the feeling that it is --

A (Continuing) But my experiment indicated that in those with the extreme difficulty of body buffer zone, those with large body zones, that even though they tried to back away or kept me away as far as they could, even though they might have a wall behind them, they would still rather go further inside, although it might have relieved it a little bit, it is not significant; they still felt the anxiety.

MR. FRIEDMAN: With the Court's indulgence:

Q So then, Doctor, is it your testimony that due to the inanimate objects in the cell, the cell itself does not provide adequate body buffer zone comfort for the inmates, but absent those inanimate objects it would provide body buffer zone comfort to the inmates?

A It would providing they both stood five feet from one another, which would mean that they have about three feet or a foot and a half each to move around in, in an eight foot length.

Now, I don't consider that adequate.

Q So that if there were no furniture there, it would still be inadequate in terms of the body buffer zone?

A In terms of the body buffer zone it would be adequate if they -- I believe I answered the question, I don't want to repeat myself.

Q Well, I don't believe you have answered the question now in terms of the body buffer zone adequacy.

A Would you want me to restate it, I will.

THE COURT: Do it.

A If they stood in a five by eight space cell without any furniture or any obstructions in it, they would get out of each other's body buffer zone, if they remain within an area one and a half feet from the wall or the door and kept

five feet between them.

Q They would have to stay away from the door and the wall?

A I can't go any further, is there any specific --

Q They would be one and a half foot from the door and the wall?

A I believe that is what I said.

Q Which study was it that determined that inanimate objects affected the body buffer zone, if there was such a study?

A This was the Horowitz, Duffer and Stratton.

Q Where was that published?

A In the, "The Body Buffer Zone and Experience of Personal Space," and that is the Archives of General Psychiatry, Volume 11, 651 to 656, 1964.

Q Now, did you personally ever conduct a study wherein a person's body buffer zone was infringed by an inanimate object as opposed to a person?

A No.

Q So then your conclusions are based on the results of the Horowitz, Duffer, Stratton study; is that correct?

A That is correct.

Q If a man has a definite expectation that he will get out of an enclosed area at definite periodic intervals,

would this help the man to better tolerate the close confinement?

A Well, obviously it depends on the degree of sustained and enforced enclosure in a small space. Necessarily, if he knows he is going to go out once a month, that certainly will not be considered very much of a relief.

THE COURT: How about three times a day?

THE WITNESS: If he knows he is going to go out three times a day, that is an improvement.

My understanding was that at both of these places they spent two-thirds of their day inside the cells, and one-third of the day inside the cell is an awful lot of stress.

Q But isn't it true that every time they get out of the cell that stress is relieved?

A That is correct --

Q That is correct.

A (Continuing) Unless of course they are all let out into equally overcrowded space, then again they run into the same problem.

Q Dr. Kinzel, let me ask you this: Assuming that the Queens House of Detention and the Brooklyn House of Detention have a normal day procedure with respect to lock-out and a daily procedure for prophylactic activities, movies and

church-going, would that reduce the effect that the cell size would possibly have on your buffer zone theory?

A Yes, anything that would get them out of their cells to less crowded situations would be helpful.

(Continued on next page.)

MM/rp
2PMR1

MR. FRIEDMAN: No further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. GERITY:

Q I would like to clarify some of the aspects of the visit at Queens House of Detention.

In addition to visiting the general population cell, did you also visit an area, do you recall visiting the mental observation area?

A Yes.

Q I am not sure if you will be able to distinguish between Brooklyn and Queens, but can you describe the area in which mental observations were --

A The mental observation area was a large dormitory area.

Q That's Brooklyn?

A Yes.

Q I am asking for the Queens House of Detention.

A I believe we saw the clinic where a man could be examined.

Q Did you see any area in which detained mental sufferers were confined?

A None.

Q Do you recall hearing Deputy Warden Gallagher

having any discussions with mentally ill detainees?

MR. FRIEDMAN: I object. This is not within the scope of cross-examination.

THE COURT: You went into mental things in Springfield. I will let questions be considered in contrast.

You may answer.

THE WITNESS: Yes, I did.

Q Do you recall now where that was?

A That was in one of the regular cell areas.

Q What sort of prisoners were confined there?

A Regular detained prisoners.

Q On cross-examination, there was some question about the difference between a half and a third. Could you explain the discrepancy as to the number of prisoners in Springfield that were mentally ill?

A there were some prisoners that were considered although having personality disturbances not to be mentally ill and I think I was thinking of them in one figure on not in the other.

Q In your opinion would it make any difference in your -- in the psychological requirements of space if prisoners were from an urban area such as New York City, as opposed to the general population of the United States?

A No, I wouldn't.

Q On cross-examination you mentioned that some prisoners might -- some people might take some comfort from familiar objects or textures.

Could you elaborate on that?

A There are two issues, one is for some individual touching something soft like a rabbit foot could be comforting. The other one is the institutional one, and that is if you have an institution that is totally devoid from feminine equivalence, soft objects, colors, quiet comforting sounds, views of nature, sunlight, fresh air, and so on, if you provide an environment that is lacking in that, for those individuals who have not had much in the way of maternal influence in their lives, this is more of a stress, those individuals attach more to these equivalents, colorful things, than those individuals who early in life did have a good motherly instinct.

For this reason people in prison, especially value these kinds of things more so than you or I would. They were noticably lacking in both these institutions.

MR. GERITY: No further questions.

THE COURT: Anything more of Dr. Kinzel?

Thank you. I guess you are excused.

(Witness excused.)

A R T H U R R U B I N , called as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified as follows:

CROSS-EXAMINATION

BY MR. HERMAN (Cont'd):

Q Warden, on direct examination you were talking about the number of high school equivalency diplomas awarded at the Queens House of Detention. You said in two years you had given out 1,600.

A Yes, that's an estimated figure.

Q Are you sure that's not since the institution has been opened?

MR. HERMAN: Will you mark this for identification, please.

THE CLERK: One-page document marked Plaintiffs' Exhibit 6 for Identification.

(So marked.)

Q Warden, I show you this. This is a memo from Warden Stone and it is dated October 1st and it is a report for the month of September for the school program; right?

A Right.

Q In it it states: Examination results, month of July, seven diplomas awarded. Examination results, month of August, nine diplomas awarded.

With your figures we would have to average 66 diplomas a month to come up with 1,600 for two years.

Do you know for sure that it is 1,600, or is this --

A I -- this is based on my conversations with Mr. Stone. I wasn't in the institution when the program was started. I know of the one in Brooklyn and we were comparing notes and I recall him saying to me they had awarded in the neighborhood of 1,600 high school equivalency dipolmas and I believe it was since the program started in 1962.

Q But this is not as to the basis of the reports you have seen but the basis of a conversation?

A Right.

Q In the month of July last year, there were seven diplomas and the month of August there were nine diplomas; is that correct?

A Correct.

Q Could you tell me when you have officer shift changes at the Queens House?

A We have three major shift changes a day, 8:00 to 4:00, 4:00 to 12:00 and 12:00 to 8:00.

Q Are there any shift changes in the middle or overlaps?

A There is a shift coming on duty, it's not a major shift change. There is not an on-going -- I'm sorry, the 1:00 to 9:00 man and 5:00 to 1:00 men, these are shifts we have, so men report at 5:00 o'clock in the morning and work to 1:00. Their relief comes from 1:00 o'clock and nights.

So there are four shift changes during the day.

Q Do you have a count in the middle of the night?

A No.

Q When do you have counts?

A We have a count in the morning at 7:00 a.m., after the men are off the floor. We have a count of the men going to Court. We have a count at approximately 8:00 a.m. for the preparation of the 12:00 to 8:00 tour, and the shift change taking place, we have one at about 11:00 or 11:30 a.m., mid-day count.

Q You mean 1:00 --

A No, the 11:30 is the mid-day count. Then we have one again at between 3:30 and 4:00 o'clock for the 4:00 to 12:00 shift and then we have one in the evening at 10:00 o'clock when the inmates ar locked back for the rest of the night.

Q On direct examination you were saying how you

had a classification system but once a man is assigned to his area, if he's assigned to the homosexual area or classification, it doesn't stop, it's on-going.

If an officer recognizes a man being weak or he warrants it, he will transfer him to a certain section that is more suitable?

A Right.

Q Is it right that men get to know the men on their floor who get to stay there for a period of three or four weeks?

A Yes. They get to know a good percentage. They don't get to know each and every one of them but a good percentage.

In addition to that, our professional people are constantly screening and going through the institution to pick up any type of problems.

Q If the population were smaller, it would be easier for your staff to get to know more people?

A Presumably, yes.

Q Have you ever heard of the Correction Association of the City of New York?

A Yes.

Q They have a program in your institution; is that right?

A Right.

Q In 1972, May or June of '72, did you give an interview to the Correction Association for the City of New York?

A Yes.

Q Were excerpts of that published in a newsletter?

A Yes.

Q And a transcript was made of the entire interview?

A That's correct.

Q The interview -- withdrawn.

At this time you were warden of the Brooklyn House of Detention?

A Deputy warden.

Q Deputy warden?

A Right.

Q Did you state the following:

"Naturally, the biggest problem we face is the overcrowding, the heavy burden that is put on all our facilities. To give you an example, this building was physically designed when it opened in '57 -- this is a relatively new building by standards, although it was overcrowded the day we opened it. Unfortunately the whole building was

designed for maybe eight or 900 people at the most, and you've got fourteen or fifteen or 1,600 people in here.

"All of your facilities, the physical spaces, is just taking two men and putting them in a cell designed for one man, that is a problem right away. This is where the situation starts.

"Let's say whatever little privacy the guy may want or have, he has to share it with another. While using a lavatory, his partner is there with hom. It's sort of dehumanizing. On that point I agree with them. It's a little bit dehumanizing in the sense your whole life becomes public."

Did you say that?

A Yes.

Q "I remember when I was in the Army. I was serving my country in the armed forces. We had a community toilet there, eight guys. So while four guys were shaving, the other four were using the toilet facilities.

"All right. At that time we were free agents at the end of our tour of duty. At the end of the day, we could do a little something, go to town. We knew it's over, that's it. We go home.

"Here a guy doesn't know what he faces in here. He may be facing 10 or 15 years in state prison, so we rob him of that little bit of privacy. Right from the beginning, that is your problem. There are too many men in one spot."

Did you say that?

A Yes.

Q "Then the relationship with the staff. Just take a correction officer working on the floor. Ordinarily he would have 120 men, him and his partner, so if you want to go mathematically, each one would be responsible for 60 men.

"I'm not saying they could handle 60 men effectively but it's another 120 men to count and 120 men to make sure they are fed and another 120 men to make sure they have showers.

"Now, there is one shower on a tier. Now, you have got 30 men using that one shower. In the dayrooms to sit down and watch T.V., we have to do it in shifts. Why, we can't put the whole section in there, that would be 60 men. They would be so tight in there, nobody could evenjoy the T.V.

"Let's say a man could watch T.V. one night and we allow 30 men at a time. Whatever you're

doing, you're doing double the amount."

Did you say that?

A Yes.

Q I'm going to read again:

"Just delivering basic needs to the inmate, his food, so-called shelter requirements, his blanket, sheet, pillowcase, this is a major problem. If the machine breaks down in the laundry, we start to sweat. Why? I know the next day I won't be able to give them their laundry and all it takes is a little spark: We didn't get our laundry. Well, wait until tomorrow. You tell that to a fellow who has just come back from Court and the Judge told him what he thought of him and the Legal Aid lawyer told him to cop out and his mother and father tell him: You got into this trouble, get out of it. And here comes the deputy warden: Look, I can't give you a pillowcase tonight. Who knows, he may be swinging out or he may decide his partner at the cell is not his partner any more and take a swing at him."

Did you say that?

A Yes.

Q Then you were asked:

"If you had all of the power and all of the money and all of anything that would be necessary, if you had a magic wand, what would you do or what would you like to see done to change this institution, improve it, meet some of the problems; if you could what would you do?"

The answer was:

"Well, naturally, the first think I would do is add more facilities to allow a room, to allow breathing space."

Then you spoke about howwe have to work on the outside to try to cure some of the conditions you saw which is the cause of crime. The question was then asked and you talked about attacking the drug problem; that you saw that as a serious or more serious cancer in our society.

You were asked:

"Would you build the same type of facility as you have here?"

Do you remember that?

A Yes.

Q The answer was:

"No, I wouldn't. I'd say a good 80 per cent of the population here don't need all of this iron

and steel and gates and bars that we have. Sure we need security. There is no doubt about it. We need security to protect the inmate and staff. We also need security in the use of gates and stuff merely to control an orderly flow that everybody gets what he is entitled to. But by the same token, I can't see spending thousands on bars, gates and locking devices when the average guy here -- I feel like 80 per cent of them can do better in a small dormitory where, number one, it would be open. There would be more light, fresh air. They wouldn't have the cage-type effect which has a bad affect on a number of people and we would have better security.

"The officers would be able to observe them better and freedom of tension. But I feel I would have a certain amount of cells, too. There are some inmates who, quite frankly, we have them in here, who can't get along with other inmates. They have to be protected from other inmates or the other inmates have to be protected from the. I would try to get away from the cell type. I'd like to get something like a room.

"If a guy needs separation from the rest

of the population, there should be like some sort of a little section I could send them to where he has all the privileges.

"Right now we have a problem if certain inmates are separated. We have to take them out of the mainstream of activity. Even in prison, you have a little minority that gets done out of little things."

Did you give that last answer?

A Yes.

Q "Would you build buildings to hold as many men as this one?

"Answer: No, I would not. I think when you get over 400 men or 500 men, you're creating a monster. Even four or 500 could be very trying.

"Have you ever been to one of these hotels upstate, the noise level is enough to drive you nuts. Same with an institution. Like trying to run a prison in Times Square, and the the emphasis is to give a guy a little dignity, a little feeling that even if he is in jail, you don't rob him of whatever dignity he owns."

Did you say that?

A Yes.

THE COURT: Any redirect?

REDIRECT EXAMINATION

XX BY MR. FRIEDMAN:

Q The statement that was just read to you, when did you make that?

A I believe 1972.

Q What were the conditions at Brooklyn at the time you made that statement?

A Extremely overcrowded.

Q Approximately how many people?

A I think our census was running about 1,700 at the time. I don't recall the exact number.

Q You said on the average 40 cells are not in use at one time. Right now, how many cells are in disrepair at your institution?

A I believe it's 26.

Q Why do these cells become in disrepair?

A Broken equipment in the cell, broken toilet bowl, broken beds, locking devices jammed and tampered with.

Q And in most cases, are these cells broken as a result of normal wear and tear?

A No, as a result of vandalism.

(Continued on next p.age.)

Q Now, you stated that there were no homosexual attacks in Queens since you have been a warden. You mean absolutely none?

A Well, none that have been reported to me, and we make an unusual occurrence report on anything, any kind of thing reported to us -- in most instances where there is a forcible sodomy committed, or even a consensual sodomy, we have to take action and report it to the District Attorney's officer.

Q So then, you meant no reported homosexual event?

A Right.

Q Would it be unusual, in your opinion, for an inmate to not report a homosexual attack, if it occurred?

A No, it would not be unusual. In most instances, I believe that a lot of homosexual attacks take place, and they are not reported because the inmate is afraid --

MR. HERMAN: Objection, your Honor.

THE COURT: Overruled. He can speak from his experience.

A He is afraid of getting a certain type of a reputation, or he is afraid that the other inmates will think that he wasn't a man enough to stand up, you know, and that he will become what we refer to as a jailhouse prostitute.

How the other inmates will take advantage of him.

Sometimes a man will wait for an opportune moment

and gain his revenge a day or two later in another way. We find an inmate mysteriously fell down and smashed the side of his face, or things to that effect. We investigate, but, of course, with no corroboration or things like that, it's hard to find out what happened.

Q You had testified to the lock-out hours at your institution. Are those lock-out hours always the same and never vary?

A No. We do on occasion vary them. Let me give you an example: Just this last weekend, we had the Superbowl, and the inmates had made a request through the Deputy Warden's office to me to ask if they can stay out and watch the Superbowl.

So what we did, we modified, and with the officers' agreement -- They agreed to take a shorter meal period, the officers volunteered to do that, and we got them back to the floor, plus the few inmates that were working on the help agreed to do the cleanup job a little faster, and, you know, we got -- were able to salvage about a half hour, forty-five minutes of that lock-in period to get the inmates out on the tier sooner so they can watch the Superbowl game.

Q How often would a situation such as that occur?

A It happens from time to time throughout the year. I would estimate fifteen or twenty times during the year, or

maybe even more -- I mean, it's a thing we don't really make a record of, or keep a track of. It's a routine procedure.

MR. FRIEDMAN: Thank you, Warden.

THE COURT: All right. Thank you, Warden Rubin. You have taken a long time, but we have done our best.

(Witness excused.)

THE COURT: Mr. Tobias, any more testimony?

MR. TOBIAS: Yes, we call Warden West, from the Brooklyn House of Detention. He is in transit at the moment. He will be here in a few minutes.

I would wonder if we could have a five minute recess.

THE COURT: Yes. I will hear Mr. Friedman's motion at the conclusion of the plaintiff's case.

MR. FRIEDMAN: Thank you, your Honor.

At this time, we would move that judgment be directed for the defendants, in that the plaintiffs have failed to establish a prima facie case of anything other than discomfort resulting from overcrowding, and what they consider to be minimal lock-out time, and have shown no Constitutional violation whatsoever, certainly not cruel and unusual punishment, or any other thing like that I can think of.

THE COURT: What I said in another case was, the

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standard approved by Judge Kaufman was, the person in prison is entitled to a tolerable living environment, which is a vague Constitutional standard, but I rather think that within the rather amorphous limits of that, there is something that I have to hear argument on, or consider on the record, rather than dismiss at this point.

The motion is denied.

MR. FRIEDMAN: Thank you.

THE COURT: We will take a short recess.

(Recess.)

THEODORE R. WEST, called as a witness, first being duly Sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TOBIAS:

Q Warden West, what is the position you now hold in the Department of Corrections?

A I am a Warden. I hold the rank of Warden, presently assigned to the Brooklyn House of Detention for Men.

Q How long have you held this position?

A I have been assigned to the Brooklyn House of Detention since October 29, this year, 1974 -- Excuse me, last year, 1973.

Q What was your last position?

A I was the Warden of the New York City House of Detention for Men on Rikers Island.

Q And how long did you hold that position?

A I was there approximately four months.

Q What position did you hold prior to holding that position?

A Prior to that, I was a Deputy Warden, assigned to the Adolescent Remand Shelter.

Q Is that on Rikers Island?

A Yes.

Q What was your position prior to that?

A I was the Assistant Deputy Warden in Charge of Administration in the Bronx House of Detention for Men on River Avenue in the Bronx.

Q How many years have you been involved in Corrections?

A About twenty-one years now, going on twenty-two years.

Q And how many executive positions have you held in correctional institutions?

A Well, I have held the position of Warden, as we have discussed, Deputy Warden, which is second in command to the Warden, in one institution; Assistant Deputy Warden in Charge of Administration in another institution, and Assistant

Deputy Warden in Charge of Custody and Security in the Bronx House, also.

Q Over how long a period of time does your executive performance range?

A I would say about 1970 to the present.

Q Had you ever held the rank of Captain in the Department of Corrections?

A I did. I worked my way up to the ranks from Correction Officer. I was a Captain, and I was an Assistant Deputy Warden.

As a Captain, I was instru[illegible] in opening the new Reception and Classification Cente[illegible]kers Island. I spent four years in that command.

Q How long did you hold the rank of Captain?

A I was four years as a Captain.

MR. TOBIAS: Your Honor, at this time I would like to have this witness classified as an expert in the area of penology and corrections.

THE COURT: Do you want to have a voir dire at all?

You are Mr. --

MR. GEMINIANI: Victor Geminiani, G e-m-i-n-i-a-n-i.

(continued on next page.)

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CROSS EXAMINATION

BY MR. GEMINIANI:

Q Deputy West --

THE COURT: He is a Warden.

Q Warden West, have you ever taken any course in penology?

A Yes, I have.

Q Can you tell me where?

A John Jay College.

Q What courses did you take?

A That was at Manhattan Community College.

Q What courses did you take?

A -- in the Correction Administration. We had naturally academic courses, English I, English II. I am trying to think of the exact -- I think it was called Correction I and Correction II, if I recall correctly. It's been some years back.

Q Those are the two courses you took?

A Yes.

Q What period of time did that encompass?

A One year.

Q How many days a week?

A That was --

Q Penology courses only, how long a week?

8 West - voir dire/Geminiani

A I think that -- It's a memory problem now. We are going back a few years. I would say actual class days, at least three a week.

Q Three a week for a year. Have you published anything?

A No.

Q When did you take the course, sir, in John Jay?

A In John Jay, about -- I corrected that. It was Manhattan Community College. It was 1966-67

MR. GEMINIANI: Your Honor, I would say that we would agree that he might be an expert in actual confinement of individuals in New York City, but as to the theory of penology --

THE COURT: We have practical problems as well as theory. I will receive the testimony and evaluate it on the basis of all that I hear.

DIRECT EXAMINATION

BY MR. TOBIAS: (continued)

Q Warden West, at the present time, are there a wide variety of programs in your institution?

A There is a multitude of programs that are ongoing in my institution right now.

Q Over the past several years, dating back to about 1970, has there been an increase in these programs in your

institution?

A There has, definitely.

Q In a very, very general fashion, can you characterize these programs?

A These programs cover the field of education, recreation, religion.

I don't know if you would characterize methadone detoxification as a program, but that has been initiated in that prison, also.

Actually, I have an Assistant Deputy Warden who is in charge of programs, because the programs have proliferated to such a degree that I can't keep track of them as the Administrator.

Q What is this individual's name?

A This is Assistant Deputy Warden John Guzman.

Q How long has he been at your institution?

A He would be there, I would say, approximately three years now.

Q Does he report to you?

A He does, yes, through the Deputy Warden, the second in command.

Q Do you have contact with Assistant Deputy Warden on a daily basis?

A Yes, I do.

Q I would like to know, what is the percentage of detention inmate population that goes to court on a daily basis?

A Well, we are producing between a hundred and a hundred and forty inmates a day now, so that would put it at about possibly between 15 and 20 percent.

Q What is the present population of your facility.

A 998.

Q So out of that figure, you say that 15 to 20 percent go to court each day?

A That's correct.

Q When they go to court, how long are they gone?

A They are gone the entire day, generally. There may be some exceptions, one or two might have gone to court, reached an early Part, and been returned early in the afternoon.

But for the most part, they are out for the entire day. Some of them don't return to the institution until in the evening hours, 6:00, 7:00, sometimes 8:00 o'clock at night before they come into the Receiving.

Q Warden West, could you please tell this Court what the lock-out hours are at your institution?

A The inmates lock-out at 8:30 in the morning till 11:00. They lock-out again at 1:00 P.M. to 3:00 P.M. They lock-out again at 6:00 P.M. to 9:00 P.M.

Q Warden West, when do the inmates wake up, when

are they awakened by the Correction Officers?

A We wake them at 5:30 in the morning.

Q At 5:30, what is the routine, taking us up until 8:30, the time when they are first locked-out.

A All right. The inmate is awakened about 5:30. Those who are going to court are so advised by the Officer on post that this is their court day. They are allowed time to get up, wash up, make up their bed, do whatever they want to do in their cell.

The food wagons arrive on the tier, and the food is set up, distributed; they are fed.

Q How long does this feeding process take?

A The feeding process, normally, depending on the meal, usually a breakfast meal runs rather smoothly, the feeding process might take from the time the food is started to give out, until the time the last tray is picked up, it might take forty, forty-five minutes.

At the completion of the feeding process, those who are going to court are broke out, they are taken out of the cell, they are taken up to the on-tier barber shop, where they are allowed to shave and prepare for court. At that point then, they are taken to one of the institution's -- one of the tier's dayrooms, and they are locked in the dayroom, pending the arrival of the court pick-up officers, who arrive on the

tier and escort them into the Receiving Room.

Q Now, from exactly what time period before 8:30, between 5:30 and 8:30 -- During what time frame is this court pick-up -- does this court pick-up procedure take place.

A The court pick-up procedure starts around 7:30, between 7:20, 7:30, up until about 8:00 o'clock.

Q This, I take it, is after the inmates have eaten breakfast?

A That's right, the breakfast is finished by then, the tier sanitation has taken place, and as I said, the court inmates have been prepared for their appearance in court.

R2 fls

(continued on next page.)

Q Now, in your opinion, would it be feasible to have a lock-out during this period of time when the officers are arranging court appearances for the inmates?

A No, I don't believe it would be feasible because there are many activities going on at the same time.

As I mentioned earlier, there is tier sanitation going on, which is after the breakfast meal, the inmates then at that point sweep down, mop down the tier, catch any food spills which might create hazardous conditions on the tiers.

The officers are busily engaged trying to identify those inmates who have been scheduled for court that day and trying to move these inmates from one point on the tier to another, get them shaved and what have you.

I believe if you were to let the inmates out at that point you would preclude the possibility of getting a good count at 8 o'clock and you would also greatly increase your difficulty in getting the proper inmates out to court at the proper time.

Q Warden West, aside from the activities that you have described for us within this 5:30 to 8:30 time frame, can you tell us whether or not a headcount also is being conducted?

A There are two headcounts that go on in this same time period. There is what we call a pre-count --

Q When does that take place?

A That takes place at about 7:30, 7:35. The object of this count is to identify any problems, any errors in count prior to the actual change of tours. That gives you 20, 25 minutes leeway in which to resolve that problem without incurring a massive amount of overtime.

Then at about 8 o'clock your relieving tour comes up, which is your 8 to 4:30 tour. They arrive on the tour and they in turn have to take a count, check the security facilities, sign for certain equipment, verify the presence of certain equipment, such as the razors used for shaving and what have you, the proper amount of keys, and this is all signed and receipted for and that completes the change of a tour.

Q Warden, you mentioned something about the overtime that would be incurred if there was a miscount during this period. Could you explain that?

A Well, the officers are required to stay on the post, on duty until the house count is correct. They cannot leave the institution. If we have a bad count, there is an error in the count, we have to re-count, re-count and re-count until that thing is straightened out; we have to re-check all of our book computations, we have to re-check our additions, we have to go through the housing area and re-count the

inmates.

Where repeated errors are made, we have taken officers from one housing area and taken them to another housing area, one where they have not worked before, just on the chance that a man psychologically is repeating the same error without realizing that.

Q How much overtime can this entail?

A This can take a repeated number of overtime, each man is being paid time and a half, depending on the time it takes to get your count in.

Q Now, Warden, at this time, during this time frame, are the correction officers also eating breakfast?

A Yes, they are. The 5:30 to 2 tour comes on duty and they eat first. While they are eating the food wagons are coming up and the midnight man is preparing the food wagons. Then the midnight -- excuse me, the midnight officer eats at 5:30, I'm sorry, my mistake. While he is down eating, the 5:30 to 2 man prepares the -- receives the food wagons and has the inmate help broken out and has them start to help up the food wagon, preparatory to feeding the tiers.

Q So all the midnight to 5:30 people are eating; how many correction officers do you have on a tier?

A One on the average tier. The average housing tier has one.

Q When they are finished, do they relieve the 8 to 2 people? Do they relieve the following shift?

A No. The 5:30 tour doesn't eat again -- they eat their first meal at about 10:30, between 10:30 and 11.

Q So then during what time frame within this 5:30 to 8:30 period do we have one correction officer on a tier?

A You have one correction officer on the average housing tier from midnight on. When your 5:30 to 2 tour comes in, as I said, they relieve the midnight man and he goes down to eat. So between the period 5:30 to 6, 6:05, you only have one man on the average housing tier.

Q Then after that period of time you've got two?

A After that period of time you have two, right.

Q So I take it then the first lock-out period starts at 8:30 and continues until 11 o'clock?

A That's right.

Q When that lock-out bell rings ending the lock-out period, what does that mean? How long does it take the inmates to get assembled and get back into their cells?

A Well, there is time and motion involved, of course. There is whatever inmate activities the inmates are indulging in; they don't just drop everything and run for the cell. That just doesn't happen. They take their time. They finish up the last hand of cards or whatever they are playing, they

go to a cell, they borrow cigarettes, they go here, they borrow a book; they go there and do something else, and the officers have to kind of corral them and kind of one way get them in the cells, coaxing them, cajoling them -- I would say you have possibly a 15, 20-minute lag in there before you get your last man locked in.

Q Is it fair to say that although the bell rings at 11 o'clock, they are really all locked in their cells ready for a count at 11:20 or so?

A 11:15, 11:20.

Q Now, at 11:20 or 11:15 what happens?

A All right. At this point your food wagons will come up from the kitchen again and you have your inmate house gang out, your food handlers and sanitation gang out, and they start to prepare to feed the inmates who are on the lock-in.

This is going to take in set-up time, depending on the meal, maybe another 15 or 20 minutes of set-up time. Then what they do is they feed a tier at a time. So it's not like -- you are not feeding all eight tiers at the same time, you are feeding one tier and then another tier and then another tier, so you are consuming, depending on the meal and how fast they consume the meal, you're eating up maybe 45, 50 minutes, as high as possibly an hour. If there is ice cream on the menu, it is guaranteed an hour, because they like to

take their time on that.

Q Now, is there also a change of -- a guard relief at this point?

A There is relief for feeding at this point, yes.

Now, on most housing tiers there will be an officer who will come up and relieve the officer on post. So you still have two men on post. If we are short-handed, then there is only one man on post. They have to cross-relieve on post, one man goes down while the other man stays up.

Q And then am I correct in assuming that after the inmates are finished eating there is another clean-up period?

A There is again a sanitation period, yes. The same problem exists if you don't clean up properly after each and every meal, you run the risk of leaving food laying around, you run the risk of vermin infestation, that type of thing.

Further, gravy and spills from the trays are hazardous underfoot and you can have accidents from them. So we have another sweep-down and another mop-down and, of course, the trays all have to picked up, the spoons collected, cups collected, that type of thing. Everything has to be accounted for.

Q I take it the inmates are then let out, locked out at 1 o'clock?

A They lock out at 1 o'clock.

Q And that continues until?

A Three o'clock, when they lock in again.

Q What happens at 3 o'clock?

A Well, at 3 o'clock we pretty much repeat the process we had at 11. Once again it is possibly another 10, 5, maybe 15 minutes before we finally get them locked in.

You at that point are ready for your pre-count, which is the pre-count I discussed which takes place at about 3:30.

Q In other words, that is in preparation for a shift change?

A Right, there is a shift change at 4. So you have your pre-count during this period of time and you still have bodies coming in and out of the gates from the receiving room, from family visits, from various programs that have been delayed for one reason or another, waiting for elevators, that type of thing. There is quite a bit of activity at that point.

At 3:30 we try and freeze movement throughout the building, once again to preclude the possibility of a bad count. But it doesn't always work out that way. The officers are still required to process inmates in and out of those gates, keeping an in and out count. They now send down the count and make preparations for the change of tour. And at about 4 o'clock the next tour comes up, which is your change

of count tour.

Q When the next tour takes over, the 4 o'clock tour takes over, does that mean that there is another count?

A That's correct. There is another major house count, which is a book count. This is a change of tour count which has to come out exactly right before those 8 to 4 officers are permitted to go home.

Q And then what happens at the institution?

A All right. You start to prepare for the evening meal and it sounds repetitious but the same problems arise. You have to get one officer relieved, which is the officer who came on duty at 1 o'clock. He is relieved for chow. He goes down to eat.

Q At that point how many people are guarding the tiers?

A One. Again we are down to one. Your 4 to 12 officer, when his wagon arrives at about 4:15, whatever, 4:20, 4:30, his food wagon arrives, the same thing, he has his inmate food handlers out, and they start setting the wagon up for feeding.

By the time he opens up for feeding the other man is back from his meal and now there are two officers there and they allow the food handlers in with the trays. We are dealing once again with anywhere from 45 minutes to an hour time

lapse for feeding.

Then you have your sanitation once again after the feeding for all the reasons I have previously stated.

(Continued on next page.)

Q When will there once again be two guards per tier, at about what time?

A We have one man going down to eat, I would say, shortly after four. He's back up about a quarter to five, something like that.

Q I see. And when would you say, from your observation, the inmates have finished their evening meal, by about what time?

A Well, they finish their meal, if they start to eat by a quarter to five, they usually finish by 5:20, 5:30.

Q How long does the cleanup process take?

A Another 20 minutes to a half-hour, normally.

Q I take it this would be the final cleanup process of the day?

A No. there is another cleanup process after the completion of evening recreation at 9 o'clock lock-in.

Q Then when are the inmates locked out again?

A The inmates lock out at 6 p.m.

Q This continues until when?

A This continues until nine o'clock lock-in.

Q Have any proposals been made to extend this nine o'clock lock-out time?

A Yes. We are working on that right now. I have a rough draft of an order on my desk, a procedural change order on my desk which should be coming out within a matter

of a couple of weeks once I acquaint my staff with the provisions of it and how it is to work.

We propose to lock the inmates out - - to increase lockout until 10 p.m. by changing -- I have to change a tour of duty's hours and bring them in a little later and release them a little later, and we have to open up another tour of duty's hours a little bit to provide overlap time so that we are not stripped at any one point in time.

But I would say that, given normal time on this, without anything untoward or without any untoward interruptions, or anything of that sort, within a matter of a couple of weeks we should have them out until 10 p.m. every night.

Q After the ten o'clock lockout period is over, when do lights go out?

A Well, as of now the lights have been going out at ten o'clock. I would assume that we would have to let the lights on a little longer because once again after lock-in, there will be the sanitation and what-have-you, and there is the few minutes in which they settle down and, you know, wash their faces and hands and read a book or whatever it is they like to do after they get back in the cell.

So we will probably at that point -- I am only talking off the top of my head; I have not finalized anything on this -- but I would say that at that point the lights

will probably remain on until about 10:30 and then we will shut the lights off.

Q Warden, at your institution are the doors to the cells open during lockout period?

A Yes, they are.

Q Now, what is your feeling with respect to this practice?

A Personally, I am against it.

Q If you are against it, could you please tell the Court the reasons for its continuance at the institution?

A Well, I find with the cells open it creates quite a few problems for us in observation surveillance.

When I came to the institution it was an ongoing practice. As I previously stated, I have only been there about three months, now. It was an ongoing practice. I inquired into this practice with an eye toward modifying it and discontinuing it completely -- I don't mean modifying, I mean discontinuing it completely. I was advised that there were not sufficient equipment available in the institution, not sufficient chairs for them to use in the dayrooms; were I to lock the cells, they would have to sit on bare floors in the dayrooms, and this type of thing, and I recognized this as a valid position for the inmates to take, that they shouldn't be thrust into that position.

4 West-direct

So until I can get the equipment, I am going the way it is.

Q Incidentally, what happened to the equipment?

A The equipment, as was most of the equipment in 1970, was destroyed and the piecemeal replacements we made from what I am told in this particular prison, I can speak personal knowledge in other prisons, but in this one I am told that the same thing has happened, piecemeal replacements have --

MR. GERMINIANI: Objection, your Honor. That's hearsay. He's been told. He has no personal knowledge. He only came there three months ago.

Perhaps someone else from the Brooklyn House of Detention who has been there a longer period of time can testify about this point, but certainly not Warden West.

THE COURT: Well, he is in charge of the institution. He ought to know what the records show. I will let him say.

THE WITNESS: The piecemeal replacement of equipment suffers severe abuse. The planned life of a piece of equipment inside a jail is nowhere near what it is in your home. If it was even one-tenth of the amount of time that you can use the same

piece of equipment in your home, we'd be happy. But it's broken up either willfully, maliciously or accidentally; it gets a lot of rough use.

Q Warden West, in your opinion as an expert in the area of corrections and penology, do you think it is a good corrections practice to have cells open during lockout?

A No, I do not. I feel it is a bad practice in the particular prison I am in. I can't refer to other prisons because I am only familiar with three or four, but the ones I am familiar with, I will speak on those.

The problem is in supervision. When the cell doors are open, the officer has all these blind corners where he can't see.

We had a murder in Brooklyn not too long back which an inmate was hung in his cell. It was subsequently investigated by the District Attorney and what had apparently been a suicide turned out to be a homicide. This man had broken an inmate boycott and had gone to court when the other inmates refused to go to court and he had been summarily hung in an open cell during a lockout period.

Q That was my next question. This deed occurred during a lockout period?

A During the lockout period, yes.

Q Warden West, to your knowledge, what is the

location of the alleged -- general location, or to the greatest extent, what is the location of the alleged crimes committed by the inmates in your institution?

A To the best of -

Q What percentage?

A To the best of my knowledge, the major portion of crimes committed were committed within the Borough of Brooklyn.

Q How about the residents of the inmates; how would you characterize that in terms of which borough they come from?

A Once again, it seems to be predominantly Brocklyn residents; from the records that I have examined since I have been there, yes. I find very few out-of-Staters or, you know, people from other boroughs. They seem to emanate from Brooklyn.

It should be noted that each borough has its own detention facility,as far as is practicable, the inmates who are arrested in that borough are placed in that detention facility for the convenience of the courts, for the convenience of the family, for the convenience of the attorneys who are defending their cases.

Q What precautions are taken in your institutions to prevent instances of homosexuality, untoward events

like that?

A We try as best we can, beginning with the moment a man comes into the institution, to identify the -- well, of course, the overt homosexual is not difficult to identify but some of the latent homosexuals are rather difficult to identify. Having identified them, we segregate them, we take them out of general population for their own protection.

Further, if a man comes in and he has effeminate ways or effeminate air or manner about him, even though he may be, as the vernacular calls it, straight, we still remove him for his own protection so that he can't be, you know, assaulted up on the tiers.

In addition to this, we have very little, we have got going for us our mental health unit, which works closely with us in their evaluations and if a man turns up, you know, surfaces with strong homosexual tendencies, they advise us and we segregate him.

The real tool we use is observation. This is our only real tool. We have to move around. These officers have to move consistently, and as I stated before, with those open cells the job is a very difficult one because on each tour, there are 120 open cells for that officer to contend with, which is 120 potential corners.

Q Warden West, would you say that the greatest

percent of homosexuality are committed by one cellmate on another?

A No. It's been my experience that most of these things take place as a result of the action on the part of more than one man forcing another one to submit.

I would imagine that the greater percentage are from, I say, groups of men forcing a man into a position in a shower room or an open cell, as the case may be, and they are ganging up on him and forcing him into submission.

Q Do you have any figures on this, specifically?

A I have had occasion, since going to Brooklyn, because this was always a sore point with an administrator, I have had occasion to question the people there about the number of cases of this type reported, and I am told that --

MR. GEMINIANI: Again, your Honor, I object on hearsay..

THE COURT: He can tell the number of reports he has had.

THE WITNESS: Im told and I believe there were six reported in a year and I think one or two of these were between two cell partners, the rest were as a result of gang actions, group of men picking on a single man.

(continued on following page)

A PM

Q Warden West, in general, does your institution perform classification of inmates when they arrive?

A We perform classification as best we can under the conditions we are forced to work under.

A man comes into my Receiving Room from the courts, he presents nothing to me except his face, the clothes he wears on his back, and the officer hands me a commitment signed by a Judge. I have no more information about him other than what he tells me, what he tells my people.

So what we do at this point, we put him through a medical examination, and during this medical examination, the doctor questions him, speaks to him at length, questions his medical background, also questions if he has had any prior psychiatric hospitalizations, that type of thing.

In addition to this, my officers are working with this man closely during this period. This is a high stress period when he first enters the institution. He's forced to disrobe, he's forced to be fingerprinted, and things of this nature. The officers are able to observe him pretty closely at this point. If he is acting out aggressively, if he seems to be disorientated or confused, the officers have the training to report this to the Captain immediately, that this man just doesn't seem to be ready for general population.

The Captain who is assigned to the receiving

room has the same input coming from the medical doctor who is assigned to the receiving room. Further, we segregate notorious cases, we segregate capital cases, at least for the first couple of days.

As I said before, we segregate homosexuals, and those with effeminate ways. We try as best we can to spot those who are assaultive. This particular form of classification doesn't end in the receiving room, it continues on in the house.

As the inmate gets up on the housing area, we have members of the clergy volunteer program, we have many volunteer groups which circulate freely throughout the housing areas; we have our own division of correctional counseling services, who work in the housing on each tier. Their job is to speak to the inmates to define their problems, to refer them to the proper agencies that can handle these problems, and they also refer an inmate if they feel that he is somewhat below par mentally, or somewhat confused or depressed, that type of thing.

The officers, of course, are charged with the observation of all the areas in the tier, and if an inmate surfaces with any specific problem them, they immediately refer it to a Captain for a decision as to whether this man should or should not remain in that area.

3 West - direct

So I would say that the system of classification is pretty much a dynamic one; it's ongoing. We have a highly transient trade. We can't sit down as they do in State prison and spend days putting them in quarantine for two weeks, and there observe him like a bug under glass. We don't have him, he's into the place, he's out to court, he's there and here and everywhere; when he goes to State prisons, they have the Probation Report, and they have all manner of background material on him by the time he finally arrives there. We just don't have those advantages.

THE COURT: How long are you going to be, Mr. Tobias?

MR. TOBIAS: At least another half hour, your Honor.

THE COURT: We are twenty minutes of 5:00 now. I am supposed to have a 4:30 pre-trial. Are you going to have any other witnesses after Warden West?

MR. TOBIAS: Yes, your Honor, we are.

THE COURT: Continue, Mr. Tobias.

BY MR. TOBIAS:

Q Warden West, at your institution, is an inmate strip-searched subsequent to visits by outsiders?

A No.

Q That is not practiced at your institution?

A No.

Q What procedures are maintained at your institution to insure inmate access to the press?

A We comply with the Department's regulations to the fullest extent. The Department --

MR. GEMINIANI: I don't see that as being an issue in this case. What contact an inmate has with the press, I don't see as relevant.

MR. TOBIAS: Dean McKay brought this up as to what led to the conditions at Attica, and --

THE COURT: All right, a few minutes is all right.

A As I said, we comply fully with the Departmental regulations as they were promulgated to provide access for prisoners to the press. A reporter merely has to indicate to a prisoner that he wants to interview him. The prisoner tells us, and we set up the meeting. It's as simple as that. This is handled during any business day, 9:00 to 5:00.

In addition to that, the inmate has uncensored mail. He can write a letter to any reporter, any newspaper he wishes. This can be sent out, goes right through the mailroom, not even opened and examined.

He further, in my particular prison, has free access to telephones all day long, and he can pick up that telephone, he can call any reporter, any newspaper he wishes.

We have no controls on the telephone to that extent, as long as he is dialing within a certain codes, he is free to dial any number.

Q Could you please describe for us the facilities that are available in the dayrooms.

A The dayroom -- Would you define facilities?

Q What games, what appliances are available there?

A The dayrooms, for the most part, have possibly a table or two, and a few chairs, anyway, not certainly as many as we have inmates. The inmates, themselves, usually reserve a section of the dayroom to play handball. The room is large enough for them to play handball, and they usually have one section set aside which is mutually agreed is a handball court.

We supply a television for them, and passive games, cards, things like that.

THE COURT: I think I better adjourn now, and I think to progress as fast as we can, we ought to take a couple of hours tomorrow.

We will try to start at 11:00 o'clock tomorrow, and run at least until 1:00.

(Whereupon, the matter was continued to January 25, 1974, at 11:00 A.M.)

* * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against- 70-C-1390

GEORGE McGRATH, Commissioner of Correction for the City of New York; JOHN V. LINDSAY, Mayor, City of New York; JOHN P. KENNEDY, Warden, Queens House of Detention for Men; ALBERT OSSAKOW, Acting Warden, Queens House of Detention for Men; THOMAS J. MACKELL, District Attorney, Queens County, individually and in their official capacities,

Defendants.

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United States Courthouse
Brooklyn, New York

January 25, 1974

B e f o r e: HONORABLE ORRIN G. JUDD, U.S.D.J.

Appearances:

LEGAL AID SOCIETY
Attorney for the plaintiffs

BY: STEVEN A. HERMAN, ESQ.,
MICHAEL B. MUSHLIN, ESQ.,
PIERCE GERITY, ESQ.,
M. VICTOR GEMINIANI, ESQ.,
Of Counsel

ADRIAN P. BURKE, ESQ.,
Attorney for the City of New York

BY: DONALD J. TOBIAS, ESQ.,
-and-
JEFFREY FRIEDMAN, ESQ.,
Of Counsel

RONALD ZWEIBEL, ESQ.,
Director of Legal Affairs
New York City Department of Corrections

/1 1 THE COURT: Are we ready to continue with 189 Valvano?

THE CLERK: Civil cause on trial, Valvano against City of New York.

THE COURT: Warden West was on the stand. I presume we'll continue.

You were sworn yesterday. You are still under oath today without being resworn. You may be seated.

T H E O D O R E R . W E S T , resumed and testified further as follows:

DIRECT EXAMINATION

BY MR. TOBIAS (Continued):

Q Warden West, there has been some testimony that very often many of the TV sets in the dayrooms are broken. I'd like to know what action your institution has taken to keep these TV sets in a constant state of repair.

A We requisition annually a projected number of TV sets. Every year when our annual budget requests come up I have to anticipate the number of sets I'll need in the coming year, and it's a capital -- it's a departmental budget expense outlay.

Q Do you have personnel that fix the TV sets on particular days or maintain on-going maintenance of the -- of the sets?

A We have personnel who are assigned on an avail-

ability basis to repair the TV sets on premises, and any sets that are damaged so badly that they cannot be repaired on premises, we try and send them out for outside repairs.

Q I'd like to know whether in your opinion Sunday would be a typical day at your institution in terms of inmate movement and inmate participation in programs.

A No, it would not be -- it would not be typical. It would be an atypical day.

Q In what sense?

A Well, there wouldn't be as much off-tier movement on a Sunday. You would have some off tier movement for religious services, the various religious services that are conducted, but the rather extensive program activities that we have in the institution are not functioning on that day.

Q I'd like to know, Warden West, if you have any information as to the relative number of fights between cellmates as opposed to fights among inmates in general, or non-cellmates.

A I believe we answered this yesterday, did we not?

Q I believe we answered it with respect to incidences of homosexuality.

A I am sorry, I am sorry. I'll speak from personal knowledge on this. I've found that most fights between inmates take place in common areas, in almost any prison you

work in. There is very few fights that take place inside the cells. It's not un-- impossible, but it's not as common as outside area fights.

The inmates are entering a -- a rather strained, strange atmosphere when they come into jail, and they seem to form a sort of a symbiotic relationship when they are put in with the cellmate. And as a result the friction or whatever it is that a jail builds up is usually expressed when they get out collectively. So from my personal knowledge I don't see that many happening inside a locked cell.

Q How many phone calls may the inmates make during the day?

A There is no restriction. No restriction on the number. The hours are set, and that's the hours of lock-up, but there 's no restriction on the number of phone calls.

Q Do the inmates do the dialing themselves?

A They do. Can I qualify that?

Q Sure.

A The individual inmate who is making the phone call does not do the dialing, but an inmate, another inmate who is selected for that day, does the dialing and hands the phone -- gets a response and hands the phone to the individual who is requesting the call.

Q Are there any facilities available at your

institution to assist an inmate with personal problems?

A Yes, I believe we have many facilities for that. I have any number of voluntary groups who come into the institution daily, and this is both during the hours -- you know, the daylight hours, and in some instances in the evening hours.

And I have the voluntary clergy program, who come in, and they work day and evenings, and they work directly with the inmates. They go in on the tiers with the inmates, counsel the inmates, refer them, handle many problems themselves.

I have the -- the Department supplies the Division of Correctional Counseling Services, which is a group of young people who have been hired by the Department, and their job is to work on each housing area with the inmates, rapping with them, deciding -- you know, trying to determine what they need, what their problems are.

If a guy has a car out on the street corner or something like that, we manage to make the proper referrals and what have you. These people make referrals to drug programs, social agencies, welfare agencies. This type of thing.

Q Are the people in this program commonly referred to as correction aides?

A This was a former name, yes, correction --

Q Yes.

A (Continuing) -- aides. Yes, that's correct.

Q What action do you take in cases of untoward incidents, like fights and other unpleasant -- unpleasant happenings between inmates in a cell -- between cellmates, excuse me? If cellmates don't get along, if they consistently fight, do you take any corrective action?

A Yes, definitely, we split them up. If it's a -- a situation of just two individuals who can't quite get along with each other, and it hasn't resolved to violence, or if there is no impending violence anticipated, it's a matter of changing the cell. If there has been a fight, they are changed to different tiers completely, or different floors, so that they don't come in contact with each other.

Q How, how difficult is it to accomplish this change? Does it take an act of the Warden, or can someone lower on the administrative hierarchy accomplish this?

A Well, normally an inmate having a problem with a cellmate would approach the officer on the tier and express his problem to that officer. The officer for his part would contact the Captain, whichever Captain has responsibility for that housing area, explain the problem, and the Captain would authorize the cell transfer.

Q In terms of time, how long would this take to

accomplish, from the time the complaint is received to the time action was taken?

A It could be as few as -- a very few moments, the amount of time it takes the officer to hear the complaint, to dial the phone, to speak to a Captain to explain the problem, and to obtain permission.

There is a -- there is a certain amount of paperwork and bookwork involved, but I don't think that's what you are -- I don't think that's what you're talking about.

Q Well, is it extensive, extensive --

A No, it's a matter -- it's a matter of changing all the existing institutional records, just changing the cell location. And it has to be entered into the inmate information system computer banks.

Q Warden West, during the waking hours of the day how much time do cellmates spend together?

A Can I figure it out on paper?

Q Sure.

MR. GEMINIANI: Your Honor, I'd like to object to that question as to form. Waking hours is very unclear. Could we have counsel --

MR. TOBIAS: Sure.

THE COURT: Well, I think the warden should be able to answer that.

MR. GEMINIANI: Yes, your Honor, but I would like to know before he answers what waking hours are referred to. What time are they talking about?

THE COURT: Well, before or after. I think he'll give it in his answer.

THE WITNESS: All right, let me -- let me phrase the answer in that way: From wake-up -- we are talking about 5:30 a.m. -- they are together, presumably awake until 8:30 a.m., when they lock out, 8:15, 8:30, that type of thing.

They are in the cells again from 11 to 1.

They are in the cells again from 3 to 6, and they lock in for the final lock-in now at 9 p.m.

However, it's not at all times the case that they would be in the cell together at that time. There are many areas -- many times during the day, for instance, that one of the inmates who is a cellmate is on a house gang. He's out of a cell all those times, he's not even in the cell. If there is family visits going on in certain of these hours, the inmate is in the holding area waiting for his visit or actually being given a family visit.

There is also clinic activities and there is program activities that place during the hours that

they would normally be locked in. They are taking what we call an out-count in a particular activity area.

Q Well, now, how much uninterrupted time would you say that inmates spend together during waking hours?

A Well, for the reasons I've just -- just stated, I -- I don't think I can give you an exact figure on uninterrupted time.

In a specific case, if it was two specific inmates in a cell, we could then evaluate it.

Q Yes.

A But to -- to make a broad-based general statement, I don't think it can be done.

THE COURT: Well, it seems to me your figures would indicate that assuming they sleep from 9 o'clock until 5:30, they are together a maximum of eight hours awake? You say it may be less?

THE WITNESS: Depending on the -- depending on the activity that one or both inmates are involved in.

Q But Warden, in your experience would it be likely that it was considerably less than eight hours? Obviously, if one of the -- one of the two inmates are involved in any of the programs at your institution it would be less, so what is your answer in terms of the likelihood of their staying together for a total of eight hours?

A I -- I can only rephrase my answer or restate the answer: If -- if neither inmate is involved in any activity, we are talking about what, seven hours or eight hours that they could possibly be in the cell together during waking hours.

Q But what is the likelihood of that occurring? We are dealing with two people now.

A We are dealing with two people who would be involved in different activities at the same time.

Q Yes.

A And every inmate in my jail is not double-cell. So I think you are asking me to -- to just take a guess at this point.

(Continued on next page.)

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DIRECT EXAMINATION

BY MR. TOBIAS: (Cont.)

Q Now, Warden West, how are complaints received, inmate complaints specifically?

A Inmate complaints, usually the first person to hear them -- usually -- is the officer on the tier or it may be the correction aide or the Division of Correction Counseling Services. The complaint usually goes to the officer first and if he can't resolve it at his level he passes it up the line to the housing Captain who has that area.

However, there are other avenues an inmate can use to register a complaint.

As we stated, he has the telephones on the tier. He picks up the telephones and calls anybody he wants to call and registers his complaint, including the Mayor's Office.

If he wishes he can put his complaint -- reduce it to writing and send it through the U. S. mails. He has no problem with that. His mail goes out unopened, uncensored.

He can further complain directly to me or to any of my staff by use of what we call an interview slip. On this he states his name, his housing location, briefly states his complaint or what he wants to discuss with the

individual staff member, and he drops it in a locked interview box.

These are picked up daily, sorted through and routed to the individuals who are concerned with them.

Q Now, if an inmate wants to participate in an institutional program would he be able to use this interview slip --

A Yes.

Q -- to make his desires known?

A Yes, he can.

MR. TOBIAS: I would like to have this marked as Defendant's Exhibit I for identification.

THE CLERK: Booklet marked Defendant's Exhibit I for identification.

(So marked.)

BY MR. TOBIAS:

Q Warden, would you please describe this booklet?

A This is a booklet that's printed by the Department of Correction, and it is adapted to each prisoner in the department. It's a rules book governing the conduct of inmates in the Brooklyn House of Detention.

NOw, this covers a multitude of items, 23, I believe, or 22, to be exact. It's an informative booklet which informs the inmate in writing how to -- what his attorney

visits are, what his family visits are, how to resolve com-, plaints, what his conduct should be, how he may initiate the interview request we were just discussing, what medical and dental care is available, what recreation and religious programs, etc..

Q In that booklet, is there any information with respect to this interview slip procedure?

A I am positive there is. Yes, page 12 there is -- or I should say item 12 describes an interview request, it's uses and how it may be initiated.

Q And every inmate is given this book upon his entrance into the institution?

A That's correct.

MR. TOBIAS: At this time I would like to have this marked in evidence.

THE COURT: Have you seen it?

MR. GEMINIANI: No, we haven't.

No objection, your Honor.

THE COURT: Mark it, please.

THE CLERK: Defendant's Exhibit I marked in evidence.

THE COURT: Continue.

BY MR. TOBIAS:

Q Warden, I take it that in your capacity as head

of the institution, you have some idea as to what are the chief complaints among the inmates?

A Yes, we have -- we have lines of communications established.

Q So would it be fair to say that you get some feedback as to what the inmates are thinking in your daily function as Warden?

A I have more than one way of getting this -- this feedback. I move through the house myself. I -- I hit various areas of the house. I go up on the tiers from time to time. As time permits.

I am required to visit the commissary area and areas like this, which I do. Inmates will stop me and speak to me as I am moving around.

My staff, if a particular problem seems to be surfacing -- my staff keeps me advised on what problem is -- is in the wings.

In addition to that we have an Inmate Liason Committee which meets weekly with a member of my staff, and this is an elected representative from each floor, who -- in fact, I believe there is -- I think there is four elected representatives.

They come up and they sit down with a member of my staff and they discuss the problems of that particular

floor, of the inmates in those housing areas.

And this is done collectively in a congregation once a week.

Q Now, would you say that the cellmate situation is a chief complaint of the inmates?

A No, it is not.

Q Now, Warden West, has your institution received any evaluation from the Federal Bureau of Prisons?

A We had a visit by an inspector, I guess it is -- was, from the Federal Bureau of Prisons last year or the early part of this year -- I am not sure of the exact date. I have it here, I believe you have a copy of it, do you not?

Q Yes.

A I don't know the date on it but I believe it was within the past year, within the past calendar months this man was in the prison and communicated with the former warden that he was reasonably satisfied with the conditions he found within the prison.

Q Wasn't that a favorable report?

A I would -- I would classify it as favorable, yes.

MR. TOBIAS: I would like this marked for identification.

THE CLERK: Two-page letter marked Defendant's

J for identification.

xxxx (So marked.)

BY MR. TOBIAS:

Q Warden West, would you take a look at DEfendant's Exhibit J and tell us whether or not this is a communication that is kept in your files in he ordinary course of business at the institution?

A Yes, this is -- this would be a communication that would be kept as a permanent record.

Q Is that -- is that a duplicate copy of a == of such a communication?

A This is a duplicate copy of one that I have in my files right now, yes.

Q What does that communication refer to?

A This communication refers to a recent inspection of the facility by one F.L. Matthews, Community Programs Officer, United States Department of Justics, Bureau of Prisons.

Q And does that letter relate to an inspection that took place at your institution?

A Yes, he states that he is writing a followup to a recent inspection of the facility.

MR. GEMINIANI: Objection, your Honor. That would be hearsay.

THE COURT: Overruled.

MR. GEMINIANI: Does he plan to introduce that document?

MR. TOBIAS: I will introduce that document.

MR. GEMINIANI: It hink if the document is admitted it would speak for itself.

MR. TOBIAS: It will speak for itself. I just wanted Warden West's characterization of it.

THE COURT: All right, go ahead.

MR. TOBIAS: At this time I would like to introduce this in evidence.

THE COURT: Well, let Mr. Geminiani, if he is the one that's working on it, review it, please.

MR. GEMINIANI: Pardon me, your Honor?

THE COURT: You look at it and se whether you have an objection.

MR. GEMINIANI: Your Honor, I would have to at this time object to thiz document as hearsay. It was attempted to be qualified under the business exceptions rule. However, I believe that F.L. Matthews, the Community Programs Officer who wrote this letter would have to be here present to qualify this better under the business records exception to prove the fact that this type of letter is sent out in the normal

course of business.

Otherwise, your Honor, it's blatant hearsay. F. L. Matthews is available and he could --

THE COURT: Well, I don't pay much attention to adjectives. I think it's admissible hearsay, and especially since there has been testimony about the Federal Prison Systems.

I will overrule the objection. I will receive it.

THE CLERK: Defendant's J marked in evidence.

xxxxx (So marked.)

BY MR. TOBIAS:

Q Warden West, earlier yesterday you stated that when an inmate enters your institution you get certain reports about them and you get -- you don't get other reports about their backgrounds.

Can you please clarify this?

A Yes, we were discussing the problem, I believe, of classification within the detention prison.

Q Right.

A ANd I stated that an inmate coming through that back gate for the most part presents only his face, the clothes he's wearing on his back and the commitment from the Court. Is that what you are referring to?

Q Yes, but do you get NYSIS' reports from -- that's National Crime --

A New York State --

Q New York State, right.

A -- Information Systems.

Q Right.

Do you get that report from -- on the inmates?

A There are occasions, more recently now than before, there are occasions when we get the report. Not in every instance. And in most instances or a good many instances, the report is illegible. It's a -- what they call a facts sheet, it's a printout, and it is for the most part illegible. You can't even -- many times I can't even identify the name.

MR. TOBIAS: I have got no further questions.

CROSS-EXAMINATION

BY MR. GEMINIANI:

Q Good morning, Warden West?

A Good morning.

Q Could you tell me in your opinion if the Brooklyn House of Detention is a maximum or medium security prison? And define your -- your -- after you state -- make that statement, define your answer, please.

A I would have to reply that it is a medium

security prison with maximum security features.

Q What features are minimum security?

A Medium security, I said.

Q What features are mimimum security?

A Minimum security is a cottage type of structure with no walls around it, no bars in the window. That type of thing.

Q That's a minimum?

A Minimum.

Q And you think that the Brooklyn House of Detention has some aspects of a minimum security prison?

A No, medium.

Q Oh, medium, I am sorry.

A Medium.

Q Would you define what you interpret as a medium security prison?

A A medium security prison, as I understand it, is a prison that is within a community setting with no walls around it, and is accessible to the general public. There is no guard towers, there is no barbed wire fences, there is no 14 foot walls with machine guns on them.

Q And could you define what a maximum security prison is?

A A maximum security prison would be a prison that

has interior construction, cell blocks, confined within walls, no man's lands created by barbed wire fences, and armed posts on top of the walls.

Q Well, under that definition, wouldn't you say the Brooklyn House of Detention be then a maximum security prison?

A No, it would not.

Q Could you tell me why?

A There is no barbed wire fences around it, there is no walls around it.

Q Well, sir, there are walls around it on the outer structure, the men are not allowed to go outside --

MR. TOBIAS: Objection, your Honor.

THE COURT: Yes, please ask questions. You are not supposed to testify.

Go ahead.

BY MR. GEMINIANI:

Q In the sense of a detention center such as Brooklyn House, where there are no outside areas, so, therefore no need for barbed wire, why would you still say --

MR. TOBIAS: Objection, your Honor, counsel is testifying.

THE COURT: All right. We will let him ask the question. This was background.

BY MR. GEMINIANI:

Q Why would you then say that the Brooklyn House of Detention is not a maximum security prison? Why?

A The barbed wire fences and the high walls I am referring to are set up as deterrents to escape. They don't necessarily contain inmates within a recreation area. There is probably an iron containment area for recreation and then you go to the barbed wire fences and the no man's land as the -- as the term is used,and the high walls.

Q What aspects of the Brooklyn House of Detention fit within the minimum or medium security aspects of your definition?

A As I said, Brooklyn House fits within the medium context because it does not have these armed posts and barbed wire fences and it is set within the -- the community setting of the Borough of Brooklyn.

Q How many cells are in the Brooklyn House of Detention?

A 814.

Q Does this include dormitories?

A No, it does not.

Q Are all of these cells two-man cells? Cells used by, occupied by two men?

A I am -- I am going to give you a qualified yes

on that.

Q How many of the cells today are not being used?

A As of this morning?

Q Yes.

A I can't answer that question.

Q Could you tell me as of last week or yesterday?

A No, I cannot. We don't do that type of survey that often. That survey can be done by picking up a telephone and calling the receiving room. I can get that information at a moment's notice. So it's not a -- it's not a permanent record that I keep as part of my day-to-day activities.

Q Sir, we have received interrogatories or answers to interrogatories which we served upon the defendants and they are signed and verified by Benjamin J. Malcom and in answer to one of our interrogatories specifically about that question Benjamin Malcom answered that there were 89 unoccupied cells, unoccupied cells.

Would you agree withthat figure, do you think?

A On the date that that interrogatory was answered that figure was correct.

Q And what date was the interrogatory answered? Our copy of it, unfortunately, is not dated.

THE COURT: It's verified. There must be a

MR. GEMINIANI: Your Honor, unfortunately there is not. It's not signed either. Maybe counsel could give us the date it was verified and signed.

MR. FRIEDMAN: Well, I told you before I am not even sure it was verified and signed and I gave it to you for use with that in mind, that this might not be the final answers to interrogatories. But the only reason I gave it to you was so we could enter into a stipulation that that was our agreement.

THE COURT: Well, maybe the Warden can say whether that is the approximate number that's still unoccupied.

THE WITNESS: I can respond to that, your Honor?

THE COURT: Yes.

THE WITNESS: These interrogatories were sent to my prison to be answered, and a specific date was given, which I believe wa- sometime in the latter part of December of '73. I do not recall the exact date.

However, the interrogatories and the information on the number of cells that were single occupancy, double occupancy and vacant were as of that particular date.

Now, this fluctuates from hour to hour and from day to day.

THE COURT: Substantially?

THE WITNESS: It may fluctuate substantially, yes, sir.

Q So you would say there are approximately 89, 90, 87, someplace around that area?

A I would not say that sitting here today, no.

Q How long is the average cell kept vacant, do you know?

A There is -- there is no criteria which determines the length of vacancy of a cell. As an inmate comes in through the receiving room he's assigned to whatever cells are available on the floor.

Q How many men on the average were detained in the Brooklyn House of Detention in 1972? Again I might refresh your memory with the figure that we received in the interrogatory. It was 1471.

Do you substantially agree with that figure?

A If that's the figure that I submitted then that's the figure that's correct, yes.

Q And for 1973, 1391?

A If that's the figure that was submitted, that's correct.

THE COURT: If you have items to read from interrogatories, they are admissible as admissions and you can read them. I don't think you can quite expect the witness to have exact four-digit figures in mind.

Q Approximately jow many men are detained today, or yesterday, in two-man cells?

A This is information that I cannot give. I don't know. As I said, that fluctuates from hour to hour and from day to day.

Q Would you say that the use of two-men cells is the rule rather than the exception?

A There is no policy which mandates the use of two-man cells other than the number of bodies in the house.

Q Yes, sir, but I am trying -- excuse me -- I am trying to find out if in fact there are more men detained in the Brooklyn House of Detention in two-man cells and if in fact this isn't the normal policy that is followed in the Brooklyn House of Detention?

THE COURT: Policy or practice. Well, if you have 841 cells and an average of 1471 inmates you have a majority in two-man cells. I don't -- I don't know that that's a real issue now, is it?

THE WITNESS: May I respond to that, your Honor

THE COURT: Yes.

THE WITNESS: My census as of this morning is 995. The figure he quoted was for a year ago. The average population for a year ago, I believe.

(continued next page.)

EK flws.

Q Would you categorize the cells of the Brooklyn House of Detention as maximum security cells?

A Within my knowledge of the words, "maximum security," yes, the cells are.

Q The tenth floor presently is being used basically as a dormitory room; is it not?

A A portion of it is.

Q And that portion that is not being used as a dormitory room is being used as a gymnasium; is that right?

A That is correct.

Q How long ago was it that it was first made into a dormitory?

A It would be a guess, but I would say approximately three years.

Q Approximately how many sentenced inmates do you have in the Brooklyn House of Detention, just approximately?

A We average between 85 and 95.

Q And I presume the rest of the 995 today are pre-trial detainees?

A Yes.

Q Are the restrictions imposed upon the sentenced inmates any different than those imposed upon the pre-trial detainees?

A You will have to qualify that for me, I don't

understand the question, I don't know what you mean by "restrictions."

Q Well, the use of the gymnasium, the use of the commissary, visiting privileges, recreation, lock-out time, meals, are basically the sentenced inmates treated in exactly the same manner as the pre-trial detainee is treated?

A Well, there are many instances in which the time men, the sentenced inmates are involved in work details which allows them more lock-out time because they are actually on the job and working. The sentenced inmates do not have as many visits as the detainee, I believe the sentenced inmates have one visit per week and the detainee has a minimum of two.

Q What about the use of the gymnasium, isn't it that the sentenced inmates have the right -- have the right of gymnasium one day a week?

A One day a week? I believe that is true, as a programmed area, but as I have testified, I have a Deputy -- an Assistant Deputy Warden -- who is responsible for all programmed activities and he is more aware of the individuals gymnasium time than I am.

Q Well, presume that it is one way a week, I believe it is, why would the sentenced inmates be allowed to use the gymnasium one day a week whereas the pre-trial --

MR. TOBIAS: Objection, another presumption

which may or may not be based in fact.

MR. GEMINIANI: He said he believed it is true.

MR. TOBIAS: Yes, he believed, but we are going to get testimony on this later on.

THE COURT: We have the warden here. I will permit a hypothetical question.

Repeat your question, please.

BY MR. GEMINIANI:

Q I believe that you have stated that you believe that the sentenced inmates can use the gymnasium once a week, and I was wondering why there was a policy created to allow sentenced inmates to use the gymnasium more times, in fact, than the pre-trial detainees who are not allowed and who have not been found guilty of crime.

A The pre-trial detainee is allowed the gymnasium twice a week, as I believe the sentenced inmates are twice.

Q I think you said it was one day a week.

A No, no.

Q The gymnasium is not used --

A The gymnasium is in use daily, but we have many housing floors so different housing floors go to the gymnasium at different times on different days.

Q But don't the sentenced inmates have the use of the gymnasium one day a week, don't the sentenced inmates have the

right to use that gymnasium one day a week?

A If he does, well, but as I told you, I am not familiar with that.

Q I would like to talk about classifications, if we might:

You stated I believe yesterday that the classification is minimal, it is not as complete as you would like to make it, and in answer to a question yesterday, "Warden West, in general, does your institution perform classification of inmates when they arrive?"

The answer: "We perform classification as best we can under the conditions we are forced to work under."

Would you more completely explain what you mean by "conditions we are forced to work under."

A Yes, I was referring to the high degree of mobility of the detention inmates as opposed to the static condition of the sentenced inmate, the detention inmate comes in at any time of night or day, he is constantly out to court, he is constantly being serviced by the various areas of the institution, and he just has in all a very high degree of mobility.

He may not be there more than a few hours or a few days or a month, I have no way of knowing when he comes and when he goes.

fols.

Q But if he were to be there or was there for a few months, classification could be done?

A If I had some way of determining this in advance, possibly we could structure a program.

Q In other words, because you don't have the opportunity to know how long a person is going to be with you, classification is not attempted to the degree that you would like it to be?

A That is one of the contributing factors.

Q Let us talk about the actual length of stay, then: How many men are there in the Brooklyn House of Detention --

THE WITNESS: Excuse me, excuse me, could you excuse me one moment, please.

(Some matters were discussed off the record.)

THE COURT: Let me just ask, I can't find the answer to interrogatories among my papers, was it filed, Mr. Friedman?

MR. FRIEDMAN: The answer from the Brooklyn House of Detention, your Honor?

THE COURT: Yes.

MR. FRIEDMAN: No, that hasn't been filed for the reason which I explained, I received it from Mr. Zweibel without knowing whether or not it had been verified, and I gave it to the Legal Aid Society with

that understanding because it had been delayed.

MR. GEMINIANI: Some of these things I would like to get on the record, these figures are very important, do you want me to read from it?

THE COURT: Mr. Friedman, do you have any objection to Mr. Geminiani reading figures from the interrogatory even though they have not been verified?

MR. FRIEDMAN: No.

BY MR. GEMINIANI:

Q Could you tell me how many --

THE COURT: Just a minute.

Q Could you tell me how many men were detained in the Brooklyn House of Detention more than 30 days, as of today?

A I can't answer that as of today's date.

Q Can you answer it at all as of any date?

A As of the date on which the interrogatory was prepared.

Q Fine, sir.

Could you give me that answer, please.

A I believe I have a copy, my copy of the answer to the interrogatories, may I refer to those?

Q Yes, you may.

I believe the answer is 20, sir.

A Yes -- what was the question again, now, please?

Q As of the date of the interrogatories, that they were answered, how many detainees in the Brooklyn House of Detention were incarcerated at least 30 days?

A Are we talking about the Criminal Court holdees or the Supreme Court?

Q The Criminal Court and the Supreme Court also.

A Together they would be 123.

Q And how about 60 days?

A 122 for the two courts combined.

THE COURT: Is that right?

123 for over 30 and 122 over 60?

THE WITNESS: I am going to 30 to 60 and then 60 up. I am not combining the two figures, I am not adding the lower figure to the higher figure in each instance.

THE COURT: There were 123 from 30 to 60 --

THE WITNESS: Yes.

THE COURT: And 122 from 60 up; is that right?

THE WITNESS: That is right, sir.

THE COURT: Oh.

BY MR. GEMINIANI:

Q Reading the interrogatories, can you tell me how many people were in the Brooklyn House of Detention over 60 days?

I am not quite sure how the figures come out. Did you add the figures?

THE COURT: It is a little difficult for the Warden to answer this because the interrogatories answers are numbered but the questions to which there is an answer is not shown alongside.

Have you a set of the interrogatories?

THE WITNESS: No, I don't.

THE COURT: Does somebody have a set?

MR. GEMINIANI: The question reads:

"As of date of answering these interrogatories, state how many detainees in the Brooklyn House of Detention have been incarcerated at least 30, 60, 90, 120 days, six months, one year."

Q Warden, would you say that if we used the figures that were supplied and added all the figures up together, that is, the figures from 30 to one year, you would get a total amount of people that had been detained at least 30 days and which would come out to a total of 629 people in the Brooklyn House of Detention who have been detained for over 30 days?

A If that is what the columns total up to.

Q Yes, sir.

We have heard testimony previously from Warden Rubin

that the Queens House of Detention, and Warden Gangler from the Federal Pen at the West Street Detention Center, that they would say that about 80 percent of the inmates at their institutions don't require bars.

MR. TOBIAS: Objection. He never said that, your Honor, counsel is characterizing.

MR. GEMINIANI: High security, then.

THE COURT: Maximum security.

MR. GEMINIANI: Maximum security.

THE COURT: Eighty percent would not require maximum security.

MR. TOBIAS: I don't believe that that was Warden Rubin's testimony at all.

Your Honor, I don't believe that was Warden Rubin's testimony, and I want that for the record.

THE COURT: That must be available here.

What is your question?

MR. GEMINIANI: Does he hold the same theory, does he believe in the same theory.

THE WITNESS: May I respond to that?

THE COURT: Yes.

THE WITNESS: I find personally that pat figures like that are very dangerous.

On any given day these figures and statistics

change rapidly, and I am certainly not going on record with a number, with a numerical number that I feel should be in maximum security.

Q Would you say that the majority of the people, then, do not require maximum security; would you say that?

A I would say that that question would have to be answered predicated upon a proper classification system, an intensive, in-depth classification system, which would take into consideration all of the variables that a classification system implies.

Q Well, if you could have an intensive and in-depth classification system, do you think after all the years of experience that you have had that the majority of people that had been so classified would not require maximum security?

A You are asking me to answer a question based on something that doesn't exist.

I don't have that in-depth classification system, I have no information to draw that opinion from.

Q But if you had adequate funds --

MR. TOBIAS: Your Honor, that question was asked and answered already, I think this is the third time he is asking.

THE COURT: He is asking a different question now.

Q If you had adequate funds --

THE COURT: Overruled.

Q (Continuing) -- to allow you to do a more in-depth classification system --

MR. TOBIAS: Objection. Leading to the same question which was answered.

THE COURT: Well, the witness may wind up in saying that the classification is not only a matter of funds but a matter of time, but I will let Mr. Geminiani ask his question and then I will rule on it.

Q Do you think you could do a more accurate classification of the inmates coming into the Brooklyn House of Detention and being detained of course at the Brooklyn House of Detention?

A I don't think that funds and/or personnel are the only problems that I face.

As I testified earlier, an inmate may only be in my institution for two hours, in that two hours he is capable of acting out violence and assault and/or murdering somebody --

Q Yes, but --

A It is not just a matter of funds and people.

Q But after someone has been there for 30 and 60 days, and the majority of the people at the Brooklyn House of Detention have been detained over 30 days, in fact 60,

do you doubt that you, with the use of more proper funds, could not do a more extensive classification on these people?

A We do begin classification work-ups, but that classification category, that category would change from day to day.

I have detainees in the institution who come in with relatively minor charges and they present a low-profile appearance. They are not aggressive, they are not violent, they have relatively minor charges, bail may only be $5,000 or $10,000, and then three weeks later I learn that he is a fugitive, a homicide, a state fugitive. Obviously, that is a very real problem for my people in classification. This man is served with a warrant. They know the warrant is outstanding against them, I don't. He presents a low-profile appearance to me but he is in fact a potential danger.

Q But there are many people who are not potential dangers; are there not?

A There is no question about it.

Q In fact, under your system because of the fear of the few that might be potentially dangerous, aren't you submitting less dangerous people to the maximum security condition?

A Well, we are going back to maximum security. I am not a maximum security prison, to begin with, as I

testified, I am a medium security prison with maximum security features.

The maximum security feature I refer to is the fact that I have interior cell construction --

Q Then they are being subjected to maximum security conditions?

A Features.

Q Some features?

A Right, right.

(Continued on next page.)

Q So that is true?

A As I testified already, if I can't classify a man in the short period of time he is with me, I have a duty to protect the lives and the well-being of the employees and the inmates contained in that facility.

Q There was a riot in the Brooklyn House of Detention?

A The was a riot in the Brooklyn House of Detention I believe in 1970.

Q Do you have any idea what changes were made in the Brooklyn House of Detention after the riot took place?

A I can't respond to that question, I don't feel qualified to answer it. I don't know how much change has been made because I don't know what the conditions were existent before the riot.

Q Do you favor dining rooms or eating in a cell, given the funds; given the proper facilities, what is it that you favor -- and security, of course, given proper security?

A I am going to qualify that question once again in the light of classification. If I had an adequate system of classification and could with some reasonable degree of accuracy predict the behavior of an individual inmate, I would then favor the community dining room. However, I don't always have this, and the most explosive situation is a

riot in a community area.

Q You face this problem in the dayroom every day when you release all the prisoners into one room, 60 prisoners into one dayroom.

A But I haven't equipped them with weapons.

Q Nevertheless, in a two-man cell both of the prisoners do have weapons and they are detained by themselves there, no one can prevent one of the men from attacking the other man except a guard who may be --

THE COURT: You give a lot of argument rather than asking questions.

The witness should testify to the facts, I think.

Q Isn't it also dangerous to give men weapons in a two-man cell?

A There is a degree of risk involved, yes.

Q Why would there be a greater degree of risk, a greater degree in a community dining room than there would be in a two-man cell?

A Because in a community setting the passion of the moment seems to carry people along, if two men are fighting inside a cell, it is two individuals and on a one-to-one basis. The situation can be contained rather readily by the officers on their post because they are only dealing with two individuals.

In a community setting it has been my experience, that is, when two individuals jump up to their feet to fight or to throw something at each other, you have a general rising of bodies, tempers flare and things start to fly, and the officers on their posts cannot contain the situation.

There is a greater incidence of injury to more people because more people are contained in that area.

Q You are restricting them to one cell in the Brooklyn House of Detention, couldn't you use the dayrooms as dining rooms and serve in one shift 30 men in a dayroom, I believe the dayroom is 25 by 18?

A The dayroom itself from a dimensional viewpoint would most likely be adequate, once again the security situation is something else to be considered. Each time you put more than one person together you increase your security risk. If you have ten, you have increased it by ten, if you had a hundred, you have increased it by a hundred.

Q Many experts in penology disagree with you on community dining rooms --

MR. TOBIAS: I object to the question. He has been qualified as an expert.

THE COURT: Ask a question, please. You are not supposed to be telling facts.

Q Are there disagreements among experts in penology

as to the use of community dining rooms at detention centers?

A Yes.

Q Do experts in penology disagree with your position, then, that in detention centers where prior classification is not possible, that eating in cells is more something that would be preferred?

A Well, I haven't read the opinions in books of every expert in penology. I try as best I can in my limited time available. I have no doubt there is probably somebody who disagrees with me.

Q How many attempted suicides have you had in 1972 and 1973?

A Attempted suicides or suicides?

Q Attempted.

A I don't have that figure.

Q Would you say it would be between 60 and 70? Do you have any way of knowing at all?

A No, no, I wouldn't say that, I don't have that information and I can't respond to that question.

Q Who is Albert Glick?

A Albert Glick was the former Warden at the Brooklyn House of Detention.

Q During what year or years?

A I would have to take a guess, I can't give you the

exact dates.

THE COURT: What is your best recollection?

THE WITNESS: I would say he was there as a Deputy Warden, I believe the Deputy Warden in command, and he might have been promoted to the rank of Warden there.

I believe Warden Monroe has been there about two years. It is just a very hazy guess.

Q Would you say that in June of 1970 that it would be fairly accurate --

A That he was Deputy Warden at the Brooklyn House of Detention, I can't swear to that, no.

MR. GEMINIANI: Your Honor, I would like to read into the record, then, a statement by Warden Glick or Deputy Warden Glick contained in the interrogatories.

THE COURT: Is it in the interrogatories?

MR. GEMINIANI: Yes, it is.

THE COURT: Well --

MR. TOBIAS: In this series?

MR. GEMINIANI: Yes.

It is concerning a death of an inmate, Henry Cooper, and it's a recommendation, and it makes the statement that in the year 1970 to date this institution has had 32 attempted suicides.

MR. FRIEDMAN: Your Honor, one of the ways to answer interrogatories is to provide a person with what the question posed in the interrogatory.

May I ask that that be done?

THE COURT: Well, it looks more like a document that is attached to it.

MR. FRIEDMAN: It was attached.

MR. GEMINIANI: It requests to have suicidal reports made available --

THE COURT: Read it and I will consider what to do about it.

MR. GEMINIANI: Pardon me.

THE COURT: From whom is this letter or memorandum from?

MR. GEMINIANI: This is a memorandum from the Deputy Warden in command of the Brooklyn House of Detention.

MR. TOBIAS: Your Honor, what relevancy has that communication, written in 1970, to this case, in the first place.

MR. GEMINIANI: It has very much relevancy concerning tension existing --

THE COURT: What date was that in 1970, what was the date in 1970?

MR. GEMINIANI: June 17, 1970.

Your Honor, it relates to the tension existing in a facility when men are detained, two men in a cell, and as we have shown, we believe denied adequate recreation and movement in the prison.

THE COURT: June '70 is before the 1970 riot in the various prisons, and I think it has less relevancy than more recent figures might, but, Mr. Tobias, if this is a statement made by Warden Glick, I suppose it has some connection.

MR. TOBIAS: All it establishes is that conditions which we are discussing are much different than the conditions that existed in 1970.

MR. GEMINIANI: It hasn't been established at all.

MR. TOBIAS: Well, the population level --

THE COURT: You are very new in this case, Mr. Geminiani, I have had it for three years.

The Jenkins case was three years, I have had the Valvano case that long.

MR. TOBIAS: The population is half.

THE COURT: There have been city-wide changes, but read your statement and let's see, it may have something that still has current value to it.

MR. GEMINIANI: It is a memorandum --

MR. TOBIAS: Your Honor's statement is that it can now be read --

THE COURT: Yes, put it on the record.

MR. GEMINIANI: It is a memorandum dated June 17, 1970, from Albert Glick regarding the death of an inmate--

THE COURT: From whom to whom?

MR. GEMINIANI: To the Commissioner of Correction through channels, and on the fourth page it states:

"In the year 1970 to date, this institution has had 32 attempts at suicide."

MR. TOBIAS: I just fail to see its relevancy.

THE COURT: I don't think it has a great deal of relevancy, but was there anything -- you said it was a recommendation, I thought.

MR. GEMINIANI: Yes, your Honor, he says that, "immediate and complete involvement of all agencies concerned with wheels of justice by the legislature and creating a dormitory-type facility for all first admissions of all drug offenders; they should remain there until medical determination is made and complete detoxification before transfer to a detention prison."

Then it has two other recommendations. If your

Honor would like me to read them into the record --

THE COURT: Well, you are on a narrow area with the "first admission of drug offenders," that is what the recommendation relates to. It is in the record. I will leave it there.

Q Have you questions for Warden West now?

MR. GEMINIANI: Pardon me?

THE COURT: Have you some questions to put to Warden West?

(Continued on next page.)

am#4

West

BY MR. GEMINIANI:

Q Concerning the classification of the potential suicidal inmate, could you tell me what kind of classification system is used?

A Could you qualify the question; are we speaking now when an inmate first walks through the door or after he has been identified as acting out or having a problem?

Q Well, sir, say an inmate had been in the Brooklyn House of detention for some time and had attempted to commit suicide we will say on June 28, 1972, on June 5, 1972 and November 19, 1972, three times in a period of five months. What would happen to this individual, would he be put in the tenth floor for observation?

A As it stands now he would go to the tenth floor, yes.

Q And had it ever been different in the past?

A I can't respond to that.

Q How do you feel about relieving tension in a prison, what would you suggest; what do you suggest to relieve tension in a prison?

A I think that one of the tension-relievers in a prison is the amount of meaningful activity and program that you structure into the prison setting. I feel if you

can get a man involved in furthering his education, remedial reading, that type of thing, preparing him for his high school equivalency tests, this is a tension-relieving device.

Certain passive games, any type of recreation, passive games, basketball, that type of thing where he can physically work out some of his anxieties, I think that is a positive tension-reliever.

In addition to that, I feel that television is a way of escaping the reality of the moment, reading, that type of thing. Any meaningful activity that keeps him involved and allows him to translate anxiety and boredom into physical action.

Q Will you say, then, that the more movement and more activity that is given to an inmate, the more tension will be relieved?

A Definitely; movement is a tension reliever.

Q Movement is important?

A Yes.

Q Would you favor more movement in the Brooklyn House of Detention?

A I favor, my policy is as much movement as I possibly can buil into the security requirements of the prison.

Q If you were given more money for security,

3 West

coulon't you increase the movement in the prison, the Brooklyn House of Detention?

A Well, I don't like to just be pat and say more money for security because there are limitations in the space involved, too --

Q Certainly, sir.

A Right.

There is no doubt that if I had a great deal more offices, we might be able to utilize some of the areas during their off times. We are trying it right now as best we can, to keep activity at a maximum.

I try as much as I can to keep many programs functioning at all times.

Q Would you think that if you placed a man in a cell by himself, rather than a man in a cell with someone, that tension would be reduced for the inmate who is in the cell by himself and has the privacy of the cell?

A I'm going to qualify my answer because I see many times in which it is, from an administrative penological point of view, it is sound common sense to double men up in a cell, and I'm referring now to a man who has been identified in his -- as in a state of depression. I am referring to a man who has received bad news from home --

Q You are referring to a possible suicide?

A Yes, sir, right, right,

Q Shouldn't they be placed under suicidal observation?

A Well, there are men who come into the prison and ask to be doubled as they come right through the receiving room.

Q The majority of men do prefer to be detained in one cell and have a private cell?

A Apparently not, because I am not getting complaints on that line. This type of complaint is not surfacing at the meetings with the inmates.

Q Would you prefer the use of one man to a cell?

A As an administrator, I would prefer to be given the ability to go to one cell, but I would not want to be mandated to one cell for the reasons I just detailed, for the obvious reasons I just stated.

Q Well, for the individual that requests a two-man cell and for the individual who might be suicidal because of bad news or depression, then for those individuals you might favor two-men cells?

A That is correct.

Q But for most average individuals who didn't feel they wanted to be in a two-man cell in the facility, wouldn't you rather have a single cell available?

A I would prefer the single cell, but with the mobility to move them.

Q I ask you this question, then, would you prefer, if you had the facilities, to have more walking space than you have in the Brooklyn House of Detention and longer lockout periods?

A The lockout period is a question that is one-- how can I phrase it -- a complicated question.

Q Let's take a moment to --

A You can't respond to that type of question.

(continued on following page)

Q Let's take the movement then --

THE COURT: You put two questions together. Suppose you ask that first.

Q Let us take movement then. Would you prefer more movement if you were given the proper facility and an increase in security than you have now at the Brooklyn House of Detention?

A If the movement is meaningful, we'd prefer it. Not for movement's sake, no.

Q Would you prefer then the use of the gymnasium for an inmate if her preferred or would like to go to the gym?

A As a matter of personal preference, yes.

Q Couldn't you use the dormitory on the tenth floor, which was formerly used as a gymnasium, for a gymnasium if you had a place for --

A Yes, I would.

Q If you did that and were given proper security, proper men and --

MR. TOBIAS: I object to the form of the question. I would like that question rephrased.

THE COURT: I think it would be better if you ask him what obstacles there are to the use of the tenth floor dormitory.

Q What obstacles are presently in your way to use the tenth floor as a gymnasium?

A The tenth floor is being used by my mental health unit to house inmates in a dormitory setting who have been evaluated by members of the mental health unit as being unsuitable for cell housing.

Q If we presume they will be placed somewhere else and the gymnasium would be available --

A If they were placed elsewhere in a setting that would be conducive to their problem, the gymnasium could be returned to its former use, yes.

Q Could you also allow inmates the use of the gymnasium more than you do presently because you would have two to use?

A I believe it would be structured so they would be able to get additional time, yes.

Q Is the help that is used to serve the meals paid?

A Yes, they are.

Q How much are they paid an hour?

A Oh, I believe -- I would take a guess at 20 to 25 cents an hour.

Q Isn't it six cents an hour, six dollars a week.

A No, I believe it has gone up. I could stand

corrected.

Q They're, I understand, outside of their cells more hours than the average inmate --

MR. TOBIAS: Objection, it is argumentative.

THE COURT: It is a question permissible. I think it has been answered.

THE WITNESS: Yes.

Q Is this a popular activity for inmates -- do you have a backlog?

A It's a popular activity for the reasons just mentioned, they are out of their cell longer and they earn, you know, a stipend weekly to help them in their commi sary purchases and that type of thing.

Q Would you say in your experience, as the length of stay increases, an inmate might become, have more tension than he had when he first came in the first day or two or week or two weeks?

A When an inmate first enters the institution he undergoes a great degree of what you would call a transitional stress. He has just been pushed through the arrest-booking procedure, he is tired, he is hungry, he is apprehensive, he has many social problems that are working on him, his family, his apartment, his dog and what have you.

When he first enters my receiving room he is

in a very, very unsettled emotional state for the most part. This will probably last a period of a few days, until we manage to adjust ourselves to each of the problems that are bothering him. He has by now had a chance to see the Judge, his bail problem has been adjusted, the people within the institution have had a chance to find out what his problems are and have adjusted themselves to those -- his wife is O.K., his dog is being fed, his car is off the street.

At that point he starts to settle down and worry about preparing his defense. I find that from my personal observations inmates who remain in prison over a protracted period of time, seem to settle in -- they are more comfortable, they are aware of the pecking order in the housing area and they have managed to work themselves into particular details such as you have discussed on the house gang and that type of thing.

To me they seem to be more stable at that point.

Q We have heard testimony from Warden Rubin that the lock out hours at the Queens House of Detention are from 8:30 to 12:45, 2:00 to 3:15 and 5:15 to 10:00 p.m. which is about an hour and three quarters longer than at the Brooklyn House of Detention as of now.

Would you tell me the reason for the difference in length of time?

A I have never seen theirs in the Queens House

of Detention. I could only hypothesize.

THE COURT: The witness spent some time yesterday saying that he was making an hour's extention of the evening lock out.

MR. TOBIAS: I do not think it has been established that the difference is an hour and three quarters. Maybe an hour.

MR. GEMINIANI: Mathematically you could figure it out. Fifteen minutes at 12:45 as opposed to 1:00. 2:45 as opposed to 3:00, 15 minutes. 45 minutes at 5:15 to -- I am sorry, 5:45. That makes 40 minutes altogether and the 9:00 to 10:00 is an hour's difference.

MR. TOBIAS: I think Warden Rubin's testimony --

THE COURT: The testimony stands. Let us go to the next question.

Q You stated yesterday -- let me ask you again in case I have this wrong. How long does it take to serve the dinner meal, have the men eat and pick the plates up again?

A Between -- if we take a point in time at which the food wagon arrives on the tier --

Q And starting at that time to the time the food wagon leaves, because the serving and picking up have been done and the eating by the individuals.

A I could only deal in generalities because it depends on the number of items on the menu, hot as opposed to cold items. It depends on the exact item as in the case of ice cream. It depends on the inmate house gang in the area, how fast they work, how effeciently they work. It depends on the officer, how closely he supervises their activity.

THE COURT: Give us a range, if you can.

THE WITNESS: I wanted to qualify my answer because we could have a variance of 15 or 20 minutes or maybe a half an hour from tier to tier or from day to day.

I would say from personal experience in dealing with this type of setting, you might run 10 to 15 minutes to get set up and then there's the amount of time to carry trays on in and what have you. I would say an hour, an hour and 15 minutes to be safe.

Q The cleaning up takes place -- the sweeping and mopping takes place while the inmates are eating?

A No, after the scooping up.

Q How do you know that?

A I have been on the tiers.

Q Have you ever seen that being done?

A Pardon?

Q Have you ever seen that being done?

A I just said I have been on the tiers.

Q And you've never seen it being done.

How long does the count of prisoners take -- there are two counts?

A There is a pre-count, a freeze of house movement and a pre-count, usually a half an hour before the final count -- 25 minutes before the final count. The final count process is usually about 20 to 25 minutes.

(continued next page.)

3am#2
Hs/elc

Q Is that count done while the men are in the cells eating?

A Well, they are not in the cells -- it could be, yes.

I will respond to that. I think it could be. It will require changing quite a few things.

Q And the mop-up, I think, you testified yesterday takes about 15 minutes?

A Approximately.

Once again, it depends on the way the individual inmates approach their duties.

Q That's an hour and 15 minutes for the delivery, eating and picking up the food and 15 minutes for the clean-up. An hour and a half, and since the count can be taken while the prisoners are eating, couldn't the entire lockin for the evening meal take an hour and 30 minutes? Where's the other hour, if they are restricted to their cells for an hour and a half?

A We are also dealing with reduced corrections officers covered. That has to be taken into consideration. I can't lock out the entire tier with only one corrections officer on the floor.

Q The reason for the other hour and a half is reduced members that you have available on the tier because

some men are eating?

A The officers are eating.

Q What about Saturdays and Sundays; you have testified that they did differ considerably from the week days -- the business days, Monday through Friday?

A That's right.

Q And you testified, I believe, that that is because many visitors aren't allowed on Sunday, I believe, because activities are not taking place?

A Reduction of program activities.

Q And yet you have an increase in the prison population on Saturday and Sunday; is that correct?

A I do not think I understand the question.

THE COURT: I think what Mr. Geminiani means is that there are less prisoners away from the institution on Saturday and Sunday.

THE WITNESS: Yes, that is correct.

Q That is correct.

Would it be possible to increase security during lockout periods if youleft the cells open to have men patrolling the catwalks outside of the cell area to have direct vision into a cell --

THE COURT: They are open in Brooklyn -- you mean, to increase the security?

MR. GEMINIANI: Yes.

THE COURT: During that time.

THE WITNESS: I think -- maybe you had better re-ask the question. I do not think I understand it.

BY MR. GEMINIANI:

Q Fine.

Is it possible for men to patrol the catwalks in the Brooklyn House of Detention and look into both tiers?

A Correct.

Q Would it not be possible to increase security if you had men patrolling the catwalks?

A Yes.

Q And therefore, wouldn't it be possible if you had a staff to patrol those catwalks to keep the cells open while lockouts are taking place?

A You are referring -- am I correct that you are assuming to the new lockout? Is that what you are referring to?

Q No, I am not referring to any particular lock-out. I think you said that you would prefer to have the cells locked during lockin?

A Correct.

Q Wouldn't it be possible to have the cells open during lockout to allow more movement by the inmates

and at the same time, the security would not go down if you had men patrolling the catwalks?

THE COURT: I guess what you mean, assuming you had men to walk the catwalks, would you then say you don't prefer to have the cells locked?

THE WITNESS: I see.

You were asking me to respond to a personal opinion that I stated yesterday.

BY MR. GEMINIANI:

Q Yes.

A Under all situations, if I have sufficient manpower, I could make the adoptions.

MR. GEMINIANI: Thank you. No further questions, your Honor.

THE COURT: Any redirect?

MR. TOBIAS: Yes, your Honor.

THE COURT: Let me ask one question:

You talked a lot about volunteer clergy.

I didn't hear anything about the functions of the official prison chaplains.

THE WITNESS: The official prison chaplains show up on Sundays to conduct services. That is what they are paid for. That is a salaried position.

The Clergy Volunteer Program is a group of

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clergymen and interested laymen who come into the institution and spend hours every day up in the tiers and the dayroom working directly with the inmates, and this is purely voluntary. It is unsalaried.

THE COURT: Does that mean the official prison chaplains are not there except on Sundays?

THE WITNESS: I do not want to sell the official prison chaplains down the drain. For the most part, the practice has been to hire them on a part-time basis. They are not paid a salary sufficient to, you know, remunerate them for spending an entire day inside the prison.

If we nee d them for any reason, we will call them and they come down. Catholic Chaplains are always available night and day for last rites, you know, to perform their ministerial duties. That is on a callup basis. They're actually only part-time employees.

THE COURT: I got the impression when I was on the Board of the Protestant Council that Chaplains were doing this in their spare time and doing less than they might have.

THE WITNESS: In some places we do have full-time chaplains.

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On Rikers' Island we lost a very, very good chaplain, Reverend Proliss. He went back to live in Germany. This man was salaried and lived on the island and we still have Father Stanley, who lives on the island, and he devotes his full time to the island institution. There are very few of those left. In the City institutions, you will find all the salaried part-time.

THE COURT: Thank you.

REDIRECT EXAMINATION

BY MR. TOBIAS:

Q Warden West, could you please tell the Court what programs have been instituted since 1970 at your institution to deal with first-time drug offenders?

A Well, the program that comes to mind immediately is the Methadon Detoxification program, which is ongoing. I do not know its inception date. I understand it has been going on for quite some time. The Brooklyn House of Detention, I think, was one of the first prisons that that program began in.

This is a program that takes an inmate coming in through the receiving room and if he has had any drug addiction or that type of thing, he is taken upstairs and he is examined medically, of course, and he can undergo the

Methadon Detoxification program. It is not mandatory. He can elect to submit to detoxification.

Q That has been established subsequent to 1970?

A I believe, yes.

Q Warden, to your knowledge do some experts feel that where you have a group congregating in one area, there is a greater risk of danger or a greater threat to institutional security?

A Yes, I have read this in more than one book.

MR. TOBIAS: I have no further questions.

THE COURT: All right. Thank you, Warden West. You can go back to work now.

Is your next witness ready, Mr. Tobias?

MR. TOBIAS: Yes.

I would like to call Deputy Warden Guzman.

(continued on following page)

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THE CLERK: State your full name, please.

THE WITNESS: John Albert Guzman, Assistant Deputy Warden.

J O H N A L B E R T G U Z M A N ,

called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOBIAS:

Q Mr. Guzman, please state your position with the Brooklyn, House of Detenion?

A I am Assistant Deputy Warden. I am assigned to the Brooklyn House of Detention. I am assigned there as the Program Director.

Q How long have you been such?

A Since May 27, 1972.

Q What are your functions as Program Director?

A As the Program Director I coordinate efforts -- all of the volunteer groups, the medical services,health services, educational services. I kind of represent the staff at all of these functions.

Q Mr. Guzman, could you please tell us what educational programs exist at the institution?

A At the present time we have three ongoing programs. We have a basic literacy program and they deal with inmates whose reading level is below the sixth grade or are totally illiterate in English but not necessarily in another language.

That's one of the programs that we have. The next one is the High School Equivalency Preparation Program and there we take the men and test them and the ones who read at a certain level are put through this program and are prepared to take the High School Equivalency Test which is given in the institution.

Q How often are these programs given?

A I have one more.

Q Excuse me?

A We have a Pre-Vocational Training Program that is administered by the New York City Community College.

They take the men who have been through these other programs, the higher reading levels, they prepare them for jobs interviews. Teach them how to conduct themselves in job interviews, how to make out applications for jobs.

Some of the inmates who have been through this group have been assisted in getting jobs when they left the place.

Q Now, there are a number of things that I would

like you to address yourself to with respect to each program.

I would like you to tell us how often each program meets. I would like you to tell us how many inmates each program will accept and whether or not the programs are open to all inmates and what qualification the inmate must have to enter the programs?

A The basic literacy program normally has anywhere from 15 to 25 inmates going through. That's run on a daily basis, Monday through Friday and usually a half-day session on each of those days.

The other half of the day -- it's either the morning section or the afternoon section, I am not sure which it is, -- the other half of the day is normally used by the High School Preparation Class -- that's also five days a week.

In the high school group at the present time we have 25 inmates going through the preparation for the examination. We have a waiting list for that class -- yesterday the count was 12 on the waiting list to get into the next group as soon as the examination is given.

Every evening from 4:30 until 8:45 we have the Pre-Vocational Training Program and there I have a flat number -- we go with a class of 35 men. That includes ten men who were held over from the last cycle who requested and

were granted additional training in the same area.. That's an ongoing thing Monday through Friday.

Q How about the Community College Program?

A That's the Community College PrograM.

Q I see.

Where do these programs meet in the institution, on the housing floor or away from the housing floor?

A These three programs that I have mentioned meet in the second fl or of the institution in a dormitory area. We call it the second floor domitory. It has been used for a number of purposes. It's an open area where we have a desk and tables set up and a blackboard.

Q Now, to your knowledge how many high school diplomas or high school equivalency diplomas have been given out in the High School Equivalency Program so far?

A I could give you an approximate figure. I am not sure if I know the exact total. I'd say out of the last three examinations we have gotten about 20 diplomas.

Q That covers how long a time period?

A We run it about three months cycle. I'd have to go back ten, eleven months -- let's say in a year's period we have had that many successfully take the examination.

Q Mr. Guzman, with respect to these three programs,

how long would inmates -- any inmate who qualifies have to wait to get in -- in terms of time now?

A Well, the way we have it set up once we get passed the second week in the prevocational program we do not add anyone to the program. That's a three-month period. If you don't get into the program from the beginning or within the first two weeks, then you would have to wait until the end of the 90 day cycle. The other two programs as the inmates are transferred to another institution or sent to another institution we try to replace them. We still try to keep it down to a specific number -- not too many in that area because it's not a really secure area.

Q What efforts are made to communicate to the inmates the fact that these programs are being offered?

A We have institutional newsletter -- the"Brooklyn House"and articles -- announcements are made in that.

We were getting ready to run a new cycle. We have a pamphlet and printed announcement that he posts on all the floors in the housing area.

Q If an inmate would be interested in joining one of these programs would he be able to indicate such an interest on those slips that Warden West referred to earlier?

A That's normally how it's done. You can always get a slip from the officer on the floor and they fillthem out and

either give them to the officer or put them in the mailbook and I pick them up -- they are brought down to the mail box on the main floor and I get them out of there and I route them to the different areas.

Q In terms of time, how long would it take between the time an inmate indicates his interest until the time that you take the action and route the slips?

A That depends solely how quickly he indicates his interest in writing. If he puts a slip in the box -- if he had put a slip in the box last night I would have it this morning.

Q And you would have taken action on it?

A Yes.

Q What other programs -- what other institutional programs exist in the Brooklyn House of Detention?

A We have an Arts & Crafts Program,for example. We have an ongoing departmental program that's run by one of our clerical officers. He is very talented in this area. He draws and sculpts. This is run five days a week and it's run about four hours a day. It's normally from 9:00 to 11:00 in the morning and from 1:00 to 3:00 in the afternoon.

Q How many inmates participate?

A At each sesstion we try not to have more than 12. This is in an area outside of the security system.

Q Where is this --

A This is held in the Arts & Craft Shop in the basement of the building where we have our maintenance shops.

Q Now, if an inmate wanted to get into this program how long would he have to wait, assuming he put his request in today?

A Again, depends on what kind of turnover we have in the program. As the opening occurs we fill them. I try to keep it up to the maximum number. In addition to the program that we run, that the department runs we have a group from the Brooklyn Museum Art School and they come in on Tuesday morning and Thursday morning and afternoon. They go directly -- the male members of that program go directly to one of the housing floors wherethey work with an entire side, they teach art and the use of the different mediums.

On Thursdays we have an instructor who comes in in the morning and afternoon and he teaches the use of watercolor. This is done in the basement area -- in the Arts & Craft Shop. We have a Ceramic Program, a teacher who comes in and teaches them how to use clay and fire it.

Q Is this done in conjunction with the Brooklyn Museum?

A Yes.

Q How many inmates are involved in this program?

A I would say that on Tuesday morning we have about 30 on the floor group -- right in the day room on the sixth floor on the C side.

The other programs run pretty much as I described them about 12 at a time in the basement.

Q This activity that takes place on the sixth floor is just restricted to the sixth floor inmates or do they come down from all floors?

A This is restricted to the inmates on that floor. This was an experimental program. They called the Warden of the institution and they told us what they had.

We decided we'd try it on one of the floors. Very recently we had a meeting we hoped to expand it to the rest of the institution. Of course, that depends on their being able to fund their program.

(continued next page.)

MR. MUSHLIN: Your Honor, I"m going to object to any proposals about what might be dont in the future.

THE COURT: Well, no, I will hear it because if I make some rules that apply to the future, I should consider what else is proposed. But I recognize that it's not something that's in existence.

All right, go ahead, Mr. Tobias.

DIRECT EXAMINATION

BY MR. TOBIAS:

Q Can you describe other institutional programs of this nature?

A Well, we have - - we have a number of programs that are ongoing in the institution. We have our different counselling services. The -- we have the division of Correctional Counselling Services which was formerly the Correction Aid Program. And they have assistant counselors who work with correction aids, and they releave the officer of a lot of the responsibilities that he had at one time, social service needs, that type of thing, seeing that the inmate has toothpaste, toothbrush, combs, enough toilet paper, soap, that type of thing. They write letters for them. They make calls for them. They make referrals to the different outside agencies for them.

They -- they -- they handle quite a number of things

for them.

Q How many such counselors are employed at the institution?

A We have 20 assistant counselors. I would have to look -- see the exact number, if you want to wait just a moment.

We have -- right now we have 25 assistant counselors. We have 20 vacancies. We have three correctional counselors and one vacancy, one supervising counselor and one vacancy, and one principle counselor, which is filled. That's the quota for that one.

Q Is there a dramatics program at the institution?

A Yes, we have a fellow named Leroy Giles, who is a professional actor and he's funded by the theater -- Theater for the Forgotten, on Tuesday, Tuesday mornings, Mr. Giles comes in and he runs this drama workshop.

The -- the workshop is normally held again in that same second floor area, in the dormitory, and it's -- it's not so much a program to teach people to act, but to get better -- a better conception of themselves.

Q How many inmates participate in that program?

A I'm trying to give you the figure right now, I believe he has ten men in that group right now.

Q Is there a waiting list for that program?

A Yes, there is a waiting list. He has a list.

Q How long does it usually take from one to move from one end of the list to the top of the list?

A Well, it depends on how quickly they go out of the program. He tries to run an eight-week group. He keeps them for eight weeks -- that's supposed to be the maximum of time that you can be in it, but some guys just move through the institution very quickly that that list moves pretty -- I would say pretty quickly.

Q Do you have any programs at the institution run by outside agencies that come into the institution and run their programs under your supervision?

A Well, in addition to the -- the relocation program that we spoke of earlier we have the prospects for Prisoner's People for example, who are professional librarians, and this voluntary group has helped develope library learning centers as such, within the institution.

They have helped us set up libraries on each of the floors. It's a mini-library, it's not a big -- not a big library. And they are usually located on the bridge area right above the main entrance. And what they -- what they do is in addition to setting up the library itself and closing the books, and of course helping us get books, they teach. They teach mathematics, English,

various -- that's one of the programs.

THE COURT: What group is this?

THE WITNESS: Sir?

THE COURT: What group is this?

THE WITNESS: The Prospects for Prisoners.

It's Prospects for Prisoners, Inc. It's a private organization of Brooklyn residents.

We have the Addiction Services Agency that comes into the institution daily, and they interview Monday to Friday or during all of the business hours. And this -- this program through interview procedures refers to the Courts qualified inmates for parole or community-based programs.

In addition to them we have a program called the New Gate Program. They come into the prison as such. They don't really work with the inmates themselves, but what this program does is they offer child care for the inmate's visitors. They pick the children up at the prison and they take them across the street to the Society of Friends' School, the Quaker School, and there the children are -- they are entertained, they are kept busy during the time that the parent is visiting.

Another part of their service is on the

day -- the two days a week that the children are allowed to visit with the parents they take the child over while the parent is visiting so they can have a quiet visit as such with the inmate, and then when it's time for the child to -- to come over, the institution calls them and they deliver the child to the -- to the prison.

While they have them over at the -- at the school, they are -- they are normally given sandwiches and milk.

They had a Christmas party for the children of the inmates and I believe that was on December 18th. I believe that was the day. I'm not perfectly sure but I believe that was the date.

We have a number of legal services that are provided in the institution by outside agencies. For example, the New York City Correctional Association, they provide legal civil help for usually problems that arise from a man's incarceration. They handle rent problems, car problems, marriage problems. In fact Mr. Rosenblum, who is the representative from that organization to our institution has been instrumental in two, maybe three marriages that we have had in the institution.

Along wi the legal civil help that they get, the Legal Aid Division comes to the institution not necessarily the ones who are represented, assigned by the Court to represent anyone, but they come to -- with the -- what they call the Legal Assistance Program, and they interview the inmates, and they are there, again five days a week during the normal business hours. And they -- they deal mainly with information for the inmates, telling him what kind of help he can get, and what kind of help he can get from Legal Aid.

Q Now, does the institution have -- are you finished with that or do you want to --

A Well --

Q If you would like to continue --

A We have the Voluntary Clergy Program.

A Yes.

Q And these are clergymen and laymen, and they -- they come to the institution not to conduct religious services but to provide social services as such. They -- they -- they visit the inmates' families, they make contact with different agengies for them. They counsel them, they -- they -- they are in the institution constantly, day and -- day and night.

In addition to the voluntary clergy program we have our regular institution chaplans, and they -- they provide the actual religious services.

We have services quite frequently in the institution. WE have religious instructions on Mondays, and that's for the Muslim group, the -- the Orthodox Muslism, -- on Monday -- Monday mornings.

On -- on Tuesday afternoons we have a group of women from the Christian Pentecostal Church, and they come in and they also do religious counselling. WE have all the regular services on Sundays, in addition to which in the evenings we have the Seventh Day Adventists come in one, two, three -- three nights a week they come in, and they counsel members of their faith and others -- they don't restrict it to just the members of the Seventh Day Adventists group.

Along with them once a week on Thursdays we have a group from the St. Vincent De Paule organization, and they come in and they hit all of the floors, after lock-in they go right down the tiers and they do counselling for the institution also.

We have a culinary art program, but that's limited to the sentence institutions. They -- this is a regular -- excuse me, sentenced inmates. This is a regular

Board of Education program and what they do is they teach them how to cook and bake. A number of inmates who have been released, discharged after serving their sentence, have been placed in different jobs through this program.

We provide in the institution a notary service. I have a number of people who went down -- were sent downtown by the institution and they took the notary test. And we have a notarizing service every day of the week.

And now I have one -- two men who go around the wheel, as such, and they -- they rotate their tours, and they -- they can provide the services if it's called for on a night tour or on a Saturday or Sunday.

We have a recreation program, and the -- the recreation program is divided into two parts. We have a movie program that goes on four days a week. That -- that's all of the time that we need to get everybody in the institution to see the same movie. And then we have the physical -- physical education program, where they are brought up and they are allowed to use the gym. They play basketball, volly ball, and when the weather permits -- and that's normally in the warmer part of the year -- the outdoor movies.

THE COURT: All right, go ahead, Mr. Tobias.

Q Now, am I not correct in assuming that

each inmate should be able to see one movie a week under your movie program?

A Yes.

Q How often -- how are the movies chosen? Are they chosen by the inmates or --

A Well, the movies that we're showing right now are -- were selected by the inmate counsel last year. Generally you have to bid for the -- put in a request for the movie a year in advance. So I had gotten complaints that they didn't like the type of movie we were getting, they felt that the movies were too old or not of the type that they wanted to see. So what we did to recommend that was we got three of the catalogues sent to the institution by the different companies that supply the films for the department, and a committee of the inmates sat down and selected 52 movies from each of the catalogues and those are the movies that are being shown now.

(Continued on the next page.)

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Q Are there any plans to institute law library facilities at the institution?

MR. MUSHLIN: Again, your Honor, I would note my objection with respect to any plans, without --

THE COURT: Well, I am listening. I presume this goes to the law library, and I am concerned about that in other respects.

MR. TOBIAS: Yes, your Honor. I'll change the question at counsel's request.

Q Do you presently have funds allocated for the establishment of a law library?

A We have probably $25,000 worth of law books in the institution right now. I am waiting for this -- this school area that we use, to be divided. It's going to be divided.

The plans for the -- the Department has right now, is to divide this into the three sections. The end section will be a law library.

They've got -- they've got to do the construction. We have the books in the institution.

Q Have you --

THE COURT: When is this construction likely to be done?

THE WITNESS: I can't tell you, sir, I don't know.

THE COURT: All right.

Q Well, have you hired a law librarian?

A I understand that the Department has hired a librarian, and they are waiting on the construction in order to send him to us.

In addition to being a law librarian, he will be teaching the inmates how to use the law books, so that they can get the maximum out of it.

Q How often do the inmates go to the commissary?

A Normally, once a week.

Q Now, how often do they go to the gymnasium?

A We try to get everyone into the gym at least twice a week, with two exceptions: Recently we had to divide the -- some of the housing areas into special security areas, and administrative segregation areas. We have a mental observation unit.

So in order to include these new areas, we had to cut down somewhere, so two of the floors in the institution -- and I believe it's the eighth and ninth floor -- go to the gym once a week.

Q What facilities exist in the gymnasium?

A In the gymnasium, the gymnasium is divided into

two parts. On one side, we have the more active games, basketball, volleyball, and they have a wall that they use, the handball court.

And on the other side, we have weights, we have a weight-lifting program. We have ping-pong tables, and this knock hockey game. That type of thing.

There are a few tables in the area that they can use to play cards. That's the more passive side of the two.

Q How many inmates participate in gym activities during the gym period?

A At one time, we were taking everyone who was on each floor up to the area, but the area isn't really big enough to accommodate them, and consequently now, the system we use is a voluntary participation system, wherein when it's the day when you are supposed to go up to the gym, you have a choice, you can go or stay in the housing area.

So we get groups up there. Sometimes, we have thirty men up there. We may have more or less. It depends on who feels like going to the gym.

Q Did you ever experience a -- or did you ever participate in a program that required the inmates to go to -- to go to gymnasium?

A Yes, we have a -- a problem with movement in the institution; elevators, for example. We have a much

larger number of people in the building daily than the place was built for. So consequently, the elevators are a problem.

We have to move a floor from the -- from their housing area to the commissary or the gym or the chapel, which are all on the eleventh floor, by elevator. So, in order to cut down the -- the tieups of the elevator, we are bringing everyone who is going to go to commissary up, and they would-- they would wait in the passive side of the gym, and from there, they would be sent into the commissary, they would get their commissary, go back into that area, and then be moved down to their floors in large groups.

In order to eliminate having to bring, say, for example, the fifth floor up for commissary, and the eighth floor up for the gym, it was structured so that you would get the commissary on the same day you were scheduled for the gym.

Q Now, in terms of --

MR. MUSHLIN: Now, excuse me, your Honor, he was referring to a time period, and I am not clear what time period that he was referring to. I believe Mr. Guzman's testimony was that this was a practice that was in the past?

THE COURT: But now they get the commissary and gym at the same time, is that right, the same day?

THE WITNESS: Right.

THE COURT: How long has that been?

THE WITNESS: A number of months, three or four months, the change there was made.

Q Now, in terms of inmate participation, I'd like to know what the experience -- the experience of the institution was when they required inmates to participate in gymnasium activities, and was there any resentment?

A Yes, there was some -- there was some resentment and it was voiced in that in the winter months, the place is not heated properly, and they were uncomfortable up there.

And the facilities are not big enough to really keep-- there's just not enough room for an entire floor. When you have got a full complement on the floor, you can have as many as 240 men, and the area isn't that big. And they were being brought up, and they had to stay, but that's -- that's been done away with.

Q And at the present time, do all the inmates who go up to the gymnasium participate in activities?

A Well, it's on a volunteer basis, so I would say that they go up there to participate.

Q Now, in the dayrooms, do you provide games and other types of facilities, leisure time activities, for the people?

A In the dayrooms, you say?

Q Yes.

A Well, periodically, we resupply all the floors with passive games, chess, chess sets, checker sets, domino sets.

MR. TOBIAS: I'd like this communication marked for identification.

THE COURT: How long do you expect to be, Mr. Tobias?

MR. TOBIAS: Another five minutes, at the most.

THE COURT: Well, I will complete the direct examination then.

THE CLERK: Document marked Defendant's K for identification.

(Continued on next page.)

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Q Could you please explain the contents of this communication, or identify it for us?

A This is a directory of services that are provided within the institution.

Q Now, am I correct in assuming that from page one to page eight, until we have this series of dashes here at the bottom of the page, that this is a list of the programs that are offered at the institution?

A Yes.

Q Now, what is the material on page eight and page nine, and the final page -- what does that refer to?

A You mean all these dotted lines?

Q Yes.

A These are agencies that we contact or refer inmates to for different services, Reality House, Phoenix Center, Fortune Society, Daytop Village.

These are referral sources for us -- that we use to refer to.

Q So, is there any communication between your institution and these organizations that are listed at the bottom of page eight and on page nine, and the top of page ten?

A Yes, whenever one of the inmates has a need for the services provided by one of these organizations, they are normally contacted through the Division of Correctional Counselling

Services, and referred to them.

MR. TOBIAS: At this time, I'd like to offer this communication in evidence.

MR. MUSHLIN: No objection.

THE COURT: It may be marked.

THE CLERK: Defendant's Exhibit K marked in evidence.

MR. TOBIAS: I have no further questions.

THE COURT: How long do you think your cross examination may be, and who is going to do it?

MR. MUSHLIN: I think a half hour, sir.

THE COURT: Well, then I think we will have to adjourn. And from this afternoon's schedule, and next week's trial schedule, all I can say is that it may be possible to hear the case some more on Thursday morning, next week.

But I can't let you know about that until Wednesday morning.

MR. FRIEDMAN: Your Honor, do you know about how much time we would have on Thursday? Would we have time for another witness, also?

THE COURT: Yes, I would say so. Now, how many more witnesses do you expect to have, and how long do you think you will need?

MR. FRIEDMAN: Well, we intend to call Dr. Anthony Cooper. He's been in Mexico, so I haven't even had a chance to discuss it.

THE COURT: What is he, an expert?

MR. FRIEDMAN: Yes, he is, your Honor. And possibly one or two others. At the most,two others.

THE COURT: Well, could you finish it off in one day?

MR. FRIEDMAN: I doubt it. Not if there is going to be cross examination of this witness, and then Dr. Cooper should take about a half a day.

Dr. Cooper may be the only other witness, so it is possible.

THE COURT: Yes, possible.

MR. HERMAN: Your Honor, Dr. Cooper testified at length in the Rem hearing. We would have no objection to introducing his testimony, you know, in toto.

MR. FRIEDMAN: We would prefer to have him here.

THE COURT: What?

MR. FRIEDMAN: We would prefer to have Dr. Cooper here.

THE COURT: I'd prefer to hear testimony rather than read it, but I do have to complete the case, and reach a decision sometime.

MR. FRIEDMAN: Also, there is the fact --

THE COURT: So let's adjourn until Thursday morning, which will be the 31st, subject to Mr. Goldstein being consulted by both sides Wednesday morning, as to whether there is going to be a conflict.

MR. FRIEDMAN: We have made a decision not to oppose any of the motions by the plaintiffs, for the class action, or for the amendment of the complaint, provided that sufficient notice is provided so they can opt out, before you make a decision, those who wish to do so.

And therefore, we see no need to come here Monday.

THE COURT: So you won't have to be here Monday, then.

MR. FRIEDMAN: Yes.

THE COURT: All right.

MR. HERMAN: Your Honor, I'd like to understand one thing. Is there going to be Dr. Cooper plus two other witnesses?

MR. FRIEDMAN: It's possible. It's possible the Commissioner might testify, and it's possible we will have a psychiatrist testify. But I don't know who that psychiatrist will be right now.

MR. HERMAN: Will you tell us when you know?

MR. FRIEDMAN: I will let you know by Tuesday.

THE COURT: Let me ask --

MR. FRIEDMAN: They've requested this information, and we have a perfect right at the end of our case, without -- at any rate, they have no way to prevent us presenting other witnesses, your Honor.

MR. HERMAN: We have no objection. It's just that we've been asking, and each day it changes. We have been trying to keep the Court's paper work down, and there has been -- we have asked, and each day it's "We are going to have two witnesses," "We are going to have four witnesses" "The Commissioner may testify", "He may not."

We are not going to have --

THE COURT: Well, you've been pretty well prepared for what's come in, I think.

MR. FRIEDMAN: And certain evaluation necessarily takes place.

THE COURT: The main witness that's coming next, is one that you do know about, so I don't think we need any more on that.

Let me just put out one suggestion, which doesn't imply decision, but would it be feasible --

and the City might consider this also -- would it be feasible to provide that after a person has been in an institution for some period, say sixty days, he might have a right to apply to go into a single occupancy cell?

MR. FRIEDMAN: A right to what, your Honor?

THE COURT: A right to apply to be put in a single occupancy cell?

MR. FRIEDMAN: Yes, we are not in a position to say that.

THE COURT: Well, that's one possible matter. Maybe you are going to want to have briefs after the hearings.

MR. HERMAN: Definitely, your Honor.

MR. FRIEDMAN: Yes.

THE COURT: You will, well, that's one possible basis for relief.

MR. FRIEDMAN: Of course, it would depend on the availability of single occupancy cells. If there are --

THE COURT: Yes. Well, it also depends on the extent to which it would give effect to the rule stated in some cases, that lack of money is not an excuse for failure to provide proper services. We don't quite have the situation here, I think, that we

do in Willowbrook, where the Department was asking for money, and the fault was the Legislature's.

MR. FRIEDMAN: No.

THE COURT: Nobody has brought into the matter budget requests, and that would complicate things.

MR. FRIEDMAN: Well, unless your Honor would order the building of a new institution, and we have no control over the inmates sent there, as your Honor knows.

It's not a Department that has control and says, "Please don't send any more inmates to our detention facilities" to the Judges of the --

THE COURT: Well, as of now, there appears to be a possibility of putting overflow into Riker's Island physically, at the expense of inconvenience both for the Courts and for the families.

MR. FRIEDMAN: Yes.

THE COURT: And I have that in mind.

MR. FRIEDMAN: Commissioner Malcolm, if he testifies, will address himself to those possibilities.

THE COURT: All right, next Thursday, I hope.

MR. MUSHLIN: Your Honor, one further matter: On the class action motion, we have submitted a proposed order for your signature.

THE COURT: Well, I don't know whehter Mr. Fried-

man's statement went so far as to approve the form of notice. I have not studied it.

MR. MUSHLIN: That's what I was going to ask.

MR. FRIEDMAN: I didn't hear.

MR. MUSHLIN: I was saying, Mr. Friedman, that on the motion for a class action, you submitted a proposed order for signature, providing the notice, and I wonder if you were consenting to the signature and entry of such an order?

THE COURT: Suppose I hold it up until Tuesday.

MR. FRIEDMAN: Your Honor --

THE COURT: And let me know by sometime Monday, if there are amendments that you would like in the form of notice.

MR. FRIEDMAN: My only concern was that people would not be given a chance to opt out before your decision, and should your decision be unfavorable to the plaintiff, then those people would complain that "Well, having been given such a chance, we would have opted out," so that could be a separate suit. So as long as that's taken care of.

THE COURT: But they must opt out before the decision.

MR. FRIEDMAN: Yes.

MR. MUSHLIN: Your Honor, I will consult with Mr. Friedman about the adequacy of our notice.

MR. HERMAN: There is one more matter. We have our photographs, which we will need a little time for on Thursday, whenever you have time.

THE COURT: Yes. All right, good afternoon.

(Whereupon at 1:10 P.M., the hearing was adjourned.)

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against- 70-C-1390

GEORGE McGRATH, Commissioner of Correction for the City of New York; JOHN V. LINDSAY, Mayor, City of New York; JOHN P. KENNEDY, Warden, Queens House of Detention for Men; ALBERT OSSAKOW, Acting Warden, Queens House of Detention; THOMAS J. MACKELL, District Attorney, Queens County; individually and in their official capacities;

Defendants.

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United States Courthouse
Brooklyn, New York

February 7, 1974
11:00 o'clock a.m.

B e f o r e:

HONORABLE ORRIN G. JUDD, U.S.D.J.

Appearances:

LEGAL AID SOCIETY
Attorney for the plaintiffs

BY: STEVEN A. HERMAN, ESQ.,
-and-
MICHAEL B. MUSHLIN, ESQ.,
Of Counsel

ADRIAN P. BURKE, ESQ.,
Attorney for the City of New York

BY: DONALD J. TOBIAS, ESQ.,
-and-
JEFFREY FRIEDMAN, ESQ.,
Of Counsel

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THE COURT: The plaintiffs that are here are Mr. Hochtazuma and Mr. Foy; Mr. Finlay is present and Mr. Brunner.

The Marshal tells me Mr. Williams did not want to come.

MR. MUSHLIN: Mr. Williams has been transferred upstate, to an upstate institution. It must have been another Mr. Williams.

THE COURT: For the City there is Mr. Friedman and Mr. Tobias.

MR. TOBIAS: I believe we were in the process of cross-examination of Deputy Warden Guzman and that counsel for the plaintiffs had not finished yet.

MR. FRIEDMAN: What was your question, your Honor?

THE COURT: I was trying to see who was here. The woman that is with you, is she a lawyer?

MR. FRIEDMAN: She is a law clerk.

We have an expert witness here, your Honor. May we put him on at this time?

MR. MUSHLIN: Before that, your Honor, Legal Aid would like to put some photographs in and put the photographer on the stand and that should be

very brief, your Honor.

L A N S I N G T H O R N E, having been first duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. MUSHLIN:

Q Mr. Thorne, what is your profession?

A I am an investigator-photographer for the Legal Aid Society.

Q Could you keep your voice up so the attorneys for the City can hear you.

A I am investigator-photographer for the Legal Aid Society.

Q How long have you been so employed?

A For the past five years.

Q Are part of your duties in that capacity taking photographs?

A That is true.

Q Were you present when photographs were taken at the Queens House of Detention?

A Correct.

Q Were you present when photographs were taken at the Brooklyn House of Detention?

A Yes.

Q When did that occur?

A At the Queens House of Detention it was Monday, January 14 and the Brooklyn facility was the following day, the 15th.

Q Who was present at the time?

A Myself, my partner Mr. Mercer, and yourself, Mr. Mushlin.

Q Under what circumstances were you present at those institutions?

A We were sent to the institutions by the Legal Aid Society with Mr. Mushlin to supervise the taking of the photographs at the said locations.

THE CLERK: Six photographs marked Plaintiffs' Exhibits 7 and 7A through E for identification.

(So marked.)

Q Mr. Thorne, I show you what has been marked for identification as Plaintiffs' Exhibits 7A through E, and ask you if those are the photographs that were taken at the Queens House of Detention on January 14th?

A Yes. These are the photographs that we took.

Q I direct your attention to the back of the photographs and ask if the notations have been made on the photographs to identify them.

A Correct.

Q Could you describe what those notations are, please?

A Starting at the top, it designates whether we were in Brooklyn or Queens, and the next to it has either TX or PX, designating whether it was Triex or Plusex film used. I use the Plusex and my partner uses Triex, so we can distinguish who took the pictures that way.

The next set of figures here is ID on the top line and then has a small 4 underneath it and that designate the roll, the fourth roll of the film that was taken.

Then it has the date 1/14/74, that is the date it was taken, and Monday the day it was taken, and then below that we have the designation of the picture. And on this one particular picture is the third floor lockout corridor.

Q Mr. Thorne, have you looked through all those photographs?

A Yes, I have.

Q Can you tell the Court, are these photographs, to the best of your knowledge, an accurate portrayal of the scenes depicted therein?

A Yes, they are.

MR. MUSHLIN: I offer these photographs in evidence.

THE COURT: Mr. Friedman, have you seen them?

MR. FRIEDMAN: I have not, your Honor.

THE CLERK: Photographs marked Plaintiffs' Exhibit 8 and 8A through E for identification.

MR. FRIEDMAN: May we have a voir dire of the witness, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. FRIEDMAN:

Q You were describing certain designations on the photographs. How did you match the designations up with the photographs themselves? In other words, how did you know when you saw a photograph that that was the third floor as opposed to the fifth floor?

A As we took the pictures, Mr. Mushlin was making notations of the particular floor, and when we gave him the contact prints he was able to determine by the roll number and his notations as to the specific location of each picture.

Q Mr. Mushlin did?

A Yes.

MR. FRIEDMAN: I will object.

THE COURT: Who made the notations on the back?

THE WITNESS: Mr. Mushlin.

THE COURT: Let me look at them.

Are the markings for the notation and roll and the date, are those made by Mr. Mushlin or by you?

THE WITNESS: These are my notations.

THE COURT: You were there while Mr. Mushlin made these notations?

THE WITNESS: Yes, that is correct.

THE COURT: It seems to me there is no real discrepancy of any great moment between the notations and the scenes that are on the pictures and so I will receive them in evidence and I will overrule the objection.

MR. FRIEDMAN: If I may just say that the witness has testified that these are accurate representations of the scenes depicted therein but he really has no knowledge, he does not know what scenes are depicted therein. All he knows is Mr. Mushlin told him this was the third floor.

THE COURT: It has some trifling effect on the weight but it does not affect the admissibility. I will receive it.

THE CLERK: Plaintiffs' Exhibit 7 and 7A through

E marked in evidence.

(So marked.)

BY MR. MUSHLIN:

Q Mr. Thorne, I show you what has been marked for identification as Plaintiffs' Exhibits 8A through E, and ask you if these are photographs that were taken in Brooklyn House of Detention on the date that you testified to.

A Yes, they were.

Q Have similar notations as to information that you testified to for the Queens photographs been made on the backs of these photographs?

A Correct. The same procedure was followed.

Q I ask you, Mr. Thorne, having looked at these photographs, could you tell the Court whether to the best of your knowledge these photographs are an accurate portrayal of the scenes presented?

A They are.

MR. MUSHLIN: I will offer them in evidence.

THE COURT: I will assume the same objection is made and the same ruling; they can be marked.

Is there anything more of this witness?

MR. MUSHLIN: No, your Honor.

THE COURT: Is there any cross-examination,

MR. FRIEDMAN: Yes, your Honor, if I can have a chance to look at the pictures.

MR. MUSHLIN: I do not think they have been formally introduced in evidence, your Honor.

THE COURT: Mark them.

THE CLERK: Plaintiffs' Exhibits 8 and 8A through E marked in evidence.

(So marked.)

(Continued on next page.)

Q Mr. Thorne, you have testified that the pictures contain an accurate representation of the matter shown therein. Can you tell me what you mean when you say it is an accurate representation?

A Well, it was an exact picture taken of the scene when we were present at the different locations.

Q You mean from your angle when you looked in that is the way it appeared?

A Right.

Q But from another angle it may have appeared to be different?

A Well, there weren't too many angles you could get because the quarters were close.

Q If there was one other angle it may have appeared different from that angle?

A Possibly.

Q When you visited the Brooklyn House of Detention did you at that time observe a on-going jazz concert while you were there?

A No, we didn't observe it, I heard it.

Q You heard it? Did you take any pictures of the area where the jazz concert was being held?

A In the auditorium, yes.

Q You have those with you?

A No, I do not.

Q What other pictures did you take that you do not have with you at this time, pictures of what other scenes?

A There was a roof area in both houses of detention that is not there.

Q Did you go to the arts and crafts room?

A We visited a library, a law library.

THE COURT: Did you take a picture of that?

THE WITNESS: Yes and in Brooklyn there was where they have classes for inmates and we have pictures of those. We took about 200 pictures over the course and our job was to photograph what Mr. Mushlin told us to and we turned them over to him and he picked out the ones to be enlarged.

THE COURT: What was the size that came out originally?

THE WITNESS: It was taken with a 35 millimeter camera.

Q As a photographer, I show you this picture which is marked Exhibit 8-B and I ask you were you not standing to the right of the cell and on an angle to your left when you took that picture?

A Well, on this one, I would say possibly to a 45-degree angle from the center. Let me explain.

Q I am asking you a few questions and I hope you can answer those.

If you were standing dead center would there not appear to be more space between the two inmates because it would not be such an angle?

A Possibly, not much more.

Q It is possible there would be more?

A Anything is possible.

Q Is it not true there would be more?

A Possibly, I say. I couldn't give you the exact dimensions but it is possible it could be.

Q It is possible.

THE COURT: Let me look at it.

MR. FRIEDMAN: Your Honor, I feel at this time that is not an accurate representation, it is taken at an angle, obviously an angle which is beneficial to the plaintiffs and it does not give an accurate representation, it only gives an accurate representation of the scene from an angle.

THE COURT: I would think they would be close together if they were taken from the exact front.

THE WITNESS: May I inject one thing, your Honor?

THE COURT: It seems to me it is sort of a matter of reasoning rather than observation.

THE WITNESS: Well, in the jail you do not have that much room and from where we took it there was only from the actual bars there to the wall bars in back of us was about four feet, so I mean you had no choice, you were very limited in the way you could take pictures in the corridor.

THE COURT: All right.

Q What is this, sir?

A May I see it closer?

Q Can you tell me where and what this is?

A This is in a cell.

Q Where?

A When you say where, what do you mean?

Q What institution?

A You mean whether Brooklyn or Queens?

Q Right.

A That I would have to see the back. There are so many pictures taken on the two days. A cell is a cell, I cannot tell you by looking at the inmates.

Q I show you a picture marked 8-D, Defendant's Exhibit 8-D.

THE COURT: Plaintiffs'.

Q Plaintiffs', excuse me, and point out to you there are many articles of clothing, clothing or whatever

hanging from the bars of the cell. Did you observe any cells where there were no such articles hanging from the bars?

A Well, the vacant cells, there was none.

Q And what about in occupied cells?

A Most of them I would say had some form of clothing.

Q Did you observe any not having any clothing hanging from the bars?

A From the vacant cells, yes.

Q Besides the vacant cells?

A I can't pinpoint it as to the exact one. I would say the majority of cells had some form of clothing.

Q I am asking did you observe any ones that did not?

A Vacant ones, I didn't.

Q Besides the vacant ones did you observe --

MR. HERMAN: Objection.

THE COURT: Objection overruled.

Q Did you observe any cells which did not have any clothing hanging from the bars?

A I can't recall.

Q You can't recall?

MR. FRIEDMAN: Your Honor, if I might also lodge one other objection against the admissibility and that

is these pictures are a month old. Such things as clothing hanging from the bars and the fact that they were hanging one month ago could have no relevance as to what is going on in the institution today. They are too far removed and remote from the issues litigated herein, and that is the present condition of the houses of detention.

THE COURT: I do not think they are so far removed in time as to make them irrelevant and I will note your comment but overrule it as an objection.

Is your expert ready now?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: Do you want to ask any more questions?

MR. MUSHLIN: No, your Honor, no further questions.

THE COURT: You are excused, thank you, Mr. Thorne.

H E N R Y A N T H O N Y C O O P E R, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE COURT: Speak loud enough so everyone can hear you, Mr. Cooper.

MR. FRIEDMAN: In order to aid the Court we will have Mr. Cooper's resume marked for identification.

THE CLERK: A three-page resume marked Defendants' Exhibit L for Identification.

THE COURT: Mark it in Evidence.

THE CLERK: So marked.

THE COURT: Do you have more than one copy so I can look at it at the same time?

MR. FRIEDMAN: I am sorry, your Honor.

THE COURT: I will wait.

MR. FRIEDMAN: So your Honor knows what they are, we have the resume and your Honor will not have to make that many notes.

THE COURT: I think Mr. Herman wants to look at it.

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Cooper, tell the Court how you are presently employed?

A I am Deputy Director of Criminal Law Education and Research Center of New York University and Deputy Director of the Center of Forensic Psychiatry, also of New York University.

(Continued on next page.)

Q For how long have you been so employed?

A In the case of the first employment for just over two and a half years. In the case of the second, since the 31st of January last year.

Q What was the first, again?

A Criminal Law and Education Research Center.

Q What are its functions, of the Criminal Law Education and Research Center?

A That center is a semi-autonomous body, a part of the law school of the New York University, which engages in research in criminal justice administration matters.

Q And what are your duties?

A I have a number of duties connected with teaching, supervision of research, the actual conduct and planning of research; and in addition to that, the ordinary administrative duties detailed by the running of the Center.

Q Is the Criminal Law Education and Research Center also referred to as the CLEAR Center?

A It is, indeed.

Q Could you please state your educational background, Professor Cooper?

A I have a degree of Bachelor of Laws from the University of London; degree of Master of Arts and Jurisprudence, University of Liverpool, England; and a Master of Laws,

Specialty in Criminal Justice, of New York University.

Q Have you engaged in any employment involving problems in penology?

A Yes.

Q Will you please describe it for the Court?

A During the course of my employment overseas I have been employed as a consultant by a number of foreign governments and I have been engaged since April 1972 on work concerning an inmate classification project with New York City.

Q Would you please describe in detail your engagements with foreign governments?

A I have been consultant to the Government of Venezuela and the Government of Peru. I was a member of a commission for the Standard Latin-American Penal Code since 1967, and I have recently been in consultation with the Mexican Government on matters relating to the administration of their prison system.

Q Are you a member of any learned societies?

A Yes, I am a member of the Executive Committee of the International Society of Social Events and representative of that society before the United Nations. I am vice president of the American Section of the International Association of Penal Law. I am a member of the International

Society of Criminology and of the American Society of Criminology.

Q Have you written any material relevant to the subject of inmate classification?

A I have written a number of articles on the subject and also a commentary on the text of the law relating to penal matters generally in Spanish.

Q Are those articles mentioned in your resume?

A They are, indeed.

MR. FRIEDMAN: Your Honor, I move that Professor Cooper classify as an expert in criminology.

MR. HERMAN: I would like to ask a few questions.

THE COURT: You may have a short voir dire.

VOIR DIRE EXAMINATION

BY MR. HERMAN:

Q Professor Cooper, have you ever worked in an institution, in a prison?

A As an administrator, no.

Q Or as a correction officer?

A No.

Q Have you ever worked in a jail as a correction officer?

A No.

Q Or an administrator?

A Not at all.

Q Professor Cooper, you mention that you had written articles concerning classification; is that right?

A Which mentions these matters incidentally, not specifically on classification as such.

Q What were those articles primarily concerned with?

A Various aspects of prison administration, generally. If I may have that --

Q Surely.

A One of the works deals very extensively -- it is the one, Comentarios Sobre la Neuva Legislacion Penetenciaria en le Peru.

Q This deals with?

A This is a book and it deals in detail, it has a detailed commentary on each of the sections pertinent to the legislation which was in force at that time.

Q This was dealing with a model penal code?

A No. In effect, this was dealing with a model code for the handling of sentenced persons.

Q Handling sentenced persons?

A Sentenced persons.

Q Does this deal with the administration in prisons or the rights that inmates should have in prisons?

A It dealt extensively with all matters relating to the effect of that legislation, both from the administration point of view and from the point of view of the individual incarcerated.

Q When you use the word "classification," how exactly do you mean that?

THE COURT: I think you are getting into cross-examination, not voir dire.

MR. HERMAN: I have nothing further.

THE COURT: I will recognize Professor Cooper as an expert but that does not mean I have to accept everything he says.

BY MR. FRIEDMAN:

Q Has the CLEAR Center, Professor Cooper, ever engaged in classification study of federal detention facilities?

A Yes. Prior to my taking on the position of deputy director, the Center was engaged by the United States Bureau of Prisons to conduct the study of the West Street Jail facility. The results of that study was a report that was produced by the Center and submitted to the Federal Bureau of Prisons. That report has not been published.

THE COURT: Has not been what?

THE WITNESS: Published, your Honor.

Q Has the CLEAR Center ever engaged in a study concerning classification of detainees in the New York City Department of Corrections?

A That is the study to which I made reference, that we have been engaged on since the beginning of 1973.

Q How do you come to be engaged in that study?

A Approximately in 1972, a request for a proposal was prepared by the City and was circulated amongst interested individuals and agencies. As a result of that request for a proposal I contacted the appropriate person in the City agency and submitted a preliminary draft of the proposal which was later accepted by the City and the draft formed the basis of the contract between New York University and the City Agency, the Department of Corrections.

Q What would you describe the nature of that study as being?

A The study was projected in the first place as an operational study to determine the feasibility of creating a new system of classification on a more scientific and satisfactory basis than the systems actually existing in the facilities for the Department of Corrections throughout the City of New York.

Q And how far have you progressed in that study?

A The study itself, insofar as the feasibility aspects are concerned, was substantially completed during 1973. The study has now passed to the operational phase involving the training of those persons who will be implementing the recommendations of that study.

Q Will you describe to the Court any work you did in preparation for the study, such as literature read that may have been relevant?

A I conducted, as in all studies of this nature, a thorough literature search to find what studies had been previously conducted and what were the results of those studies. I passed from that to digesting an analysis of that information to guide me in the project which I was seeking to research. Subsequently I made a number of visits to different facilities and from that time on I was working on the creation of the new operational system which I hoped would be a subject for modification and implementation in the City facilities.

Q Was this literature valuable from the point of view of its relevancy and was it at all applicable to New York City as to relevance, were they applicable to the New York City Department of Corrections?

A There is in point of fact very little literature

of direct relevance to this problem. I would mention that in addition to the actual literature searches I canvassed the opinions of all experts that I considered might have information that would help me, either from personal knowledge or who might have directed me to literature that would otherwise have escaped my attention.

In fact, there is very little written on the type of problem in relation to classification which is presented by the peculiarities of the New York City system.

Q Would you enumerate those peculiarities?

A The peculiarities are really two. One is that the New York City system by reason of the legal implications of the structure has a very high percentage of detention inmates. This is normally found only in systems where one is dealing with a strict jail sentencing so that literature referring to the classification of jailed prisoners is in some respects legally relevant but practically irrelevant on the count of the numbers involved.

The other problem which one faces in the matter of classification is the very rapid turnover which a system like New York City experiences. Most of the literature which concerns classification standards is posulated upon a person being incarcerated for a sufficient length of time for him to be served by a large staff of professionals moving

relatively leisurely throughout this process towards a determined date.

One sees, for example, the traditional classification hearing which really is a collection of professionals dealing with materials which have been collected for their investigation and consideration.

Neither of these considerations were present in the New York City system. There was not time to do this type of classification nor was it programmed, having regard to the fact that the population was mainly a population of detention inmates.

Q Did you encounter any previous studies, findings or methodology which would have been directly applicable to the problems of New York City Department of Corrections?

A Really no; I found much which was helpful in an indirect fashion. The study of the classification of jail prisoners which was carried out by Mark Richmond was perhaps the most valuable study which I encountered.

Q Is that CLEAR's study of the federal facility?

A This was not; this was an independent study produced under contract by the Federal Bureau of Prisons as a document to assist administrators of jail facilities.

Q What about the study that CLEAR conducted at the West Street facility, the classification study?

Why would that not be directly applicable to the problems of New York City institutions?

A I confess that during the course of my study I found it much less helpful to me than I had imagined it would be at the outset. The type of problems to which that study was directed were essentially different in nature from the problems existing in the New York City system.

Q Was there a difference in the inmates or the facilities themselves?

A It's really essentially differences in objective. The study itself was designed for different purposes from those which became apparent to me in the course of my studies during this past year.

Q Are you familiar with the present classification system at the Brooklyn House of Detention and at the Queens House of Detention?

A I am acquainted with what is done by relatively second-hand knowledge. I have observed what is done in the reception rooms and I have interviewed many of the persons who have been engaged in undertaking that work.

Q Can you describe that work for the Court?

A I would present it as extremely rudimentary from my observation. Classification is a problem which is dependent upon, to a large extent, available facilities

and this tends to determine the practice in each of the institutions.

For example, where there is a particular intake and a space is available to assign persons of a particular category, for example, homicide cases, homosexual, drug cases, this is usually done by reference to direct observation and on the basis of very slight data collections.

Q In your study and in your experience have you ever become aware of any detention facility in the United States with a more sophisticated system of classifications than presently utilized by the New York City Department of Corrections?

A I have not.

Q Would you consider your study to be a pioneer project?

A I would, indeed.

Q This is despite the fact you said you had found a study which you deemed helpful to you?

A Yes, because all studies obviously contain elements which are extremely helpful in informing one in forming impressions, directing one's attention to existing problems and the way in which attempts have been made to solve them. However, there is no study on which I could base a model for use in the City correction facilities. Had

there been such a study and had the model been susceptible of modification I could have saved myself a great deal of work.

Q In your opinion how important is classification in relation to prison administration?

A I regard it as vital. I think it is the most important single aspect of the administration of a prison or jail facility because without a knowledge on a very sophisticated level of the inmate population there can be no differential treatment accorded those persons to take account of their particular needs and the needs of the correctional administration in its everyday management of the facility.

Q Which problems in prison administration would be better served and more susceptible to a solution if there were good classification systems, in your opinion?

A Fundamentally, it is the question of security. Clearly this is a term which is not one which can be used literally but some persons are more tractable, are less dangerous than other persons in an institutional setting. They can accordingly be treated with much greater facility. They require much lighter custody and are able to function in a more open setting than would be possible with an undifferentiated population where some of the persons at any rate

presented very high security risks.

Q Would operational lockout be a problem more susceptible to a good administrative solution were there a good classification system, were this possible?

A Yes, but this of course is simply one facet of prison administration. All decisions, basically, with regard to the treatment of the inmate are dependent upon classification, putting that person into a category of a high, medium or low risk, if one wishes to make that particular distinction.

Q But if you didn't have a classification system, you could still do that; could you not?

A Oh, yes, but one would do it of course at one's peril.

Q What do you mean by that?

A I mean simply that the person who has an unclassified inmate population might decide upon a particular policy and as a result of the problems arising from a very small minority of persons might have to impose a more severe security upon the entire population to contain the potential disturbances to that security than would otherwise be necessary.

Q Would you describe the study which you have conducted for the New York City Department of Correction

and the results achieved at this point? And if you can start from the beginning and bring us up to this point --

A As I explained, we conducted firstly an analysis of all the existing work which had been done. I did not discard that work. But I found, as I explained, comparatively little to assist me in solving the problem which had been posed. This largely, then, was a question of designing an original system which would serve the peculiar needs of the Department of Correction of New York City. It seemed to me that there were a number of factors to take into consideration, primarily economic factors, the structures of the facilities themselves and how far they might be capable of modification, and to a very large extent the personnel factor and factors arising out of that human element.

Further, questions of attitude, changing attitudes, bringing in a new system without disrupting overmuch the old.

I decided on grounds of economy that a system of classification designed to employ large numbers of highly paid professionals would be not only undesirable but unrealistic. The system therefore had to make use of the available personnel, as far as possible, and to the most effective use to which that personnel with proper training

could be put.

It seemed to me that what was required in the first place was an instrument, a document which would express in the logical form all the experience of those who had connection on a daily basis with the inmate population and would enable those persons with proper training to use such a form to arrive at a classification which could be expressed in numerical terms on a relatively long scale.

I would like to explain at this point that classification in itself is not an end, it is a beginning. What you have done when you have classified a population is to distinguish so far as science or technology will allow you between different individuals comprising that population. What you do with those individuals subsequently is purely a policy decision.

My function was to produce an instrument which would enable the Department by the most economical use of its personnel and other resources to distinguish as far as possible the characteristics of an inmate population so as to group that poplulation numerically in a relatively flexible scale.

That is the stage at which I had arrived by the end of last year.

I have produced with the aid of certain

consultants a form which I was satisfied would effectively produce that type of definition.

We then began to embark on a process of personnel selection and training. It is that phase of the classification project which is currently proceeding. Personnel have been selected and are being trained by me in the use of that form.

Q And where is that training taking place?

A Training is taking place at 100 Centre Street at the Central Office of the Department of Correction, and officers are brought in to receive that training.

The latter phase of the training will take place in the facility itself, and the experimental phase of the application or implementation of the use of this form will take place under my supervision in the selected institutions, one of which is the Queens House of Detention.

Q What are the others?

A The other one is the Manhattan House of Detention.

Q Thank you.

Now, which officers did you seek to select as specifically a group of officers, the most experienced, the least experienced to train, or just any officers?

A No. We selected very largely on an individual

basis. The problems arising out of the nature of the Department's administration had to be taken into account, and the selection was made in the first instance by the warden who put to us a list of names together with the qualifications of these individuals and why they considered that these individuals should be employed on this particular task.

I had laid down certain general principles in relation to experience and in relation to length of service with the Department, principally on the type of work which I felt was compatible with the new process we were trying to introduce.

Most of these people had receiving room experience, most of them had not been the longest serving officers, we didn't want people who were too set in their ways, we wanted people in addition who had some interest in developing certain aspects of their career along professional lines and who intended as far as possible to pursue studies which would have assisted them in acquiring the expertise necessary for this type of work.

Q Thank you.

Now, you stated that you were developing a numerical scale.

How would this work? You would have the most

dangerous inmates, or what would that be, what would the breakdown be?

A Well, as I was explaining, the scale itself is simply a very flexible indicator of potentiality. One can adjust that scale according to the character of the population, the comparative character, the nature of the institution itself and the nature of the facilities available. Rather than designate, for example, a particular percentage of persons on that scale as dangerous or nondangerous, et cetera, I would rather say that the use to which that scale must be put, which as I mentioned is essentially a policy decision, would be dependent on the availability of facilities for housing and treating certain groups of inmates that was shown by that scale to possess certain types of characteristics.

Let us say that the scale which I believe runs from numerical 208 down to naught, the persons who score the highest number of points would clearly be regarded as the least manageable segment of the particular population which was examined.

Now it may be that a very high percentage of persons are to be found in, say, the other quarter of one institution as distinguished from what might be found in another.

This experimental phase, of course, we have not yet entered.

Q So that the breakdown would be relative only to that particular institution, in other words the most danagerous at that institution might not be as dangerous as the most dangerous at another institution; is that right?

A That is so, but there would be nothing to prevent an overall comparison being made of the entire New York City population, inmate population, by reference to a common scale.

Q From the point of view of this classification?

A Yes, the project itself was designed with that problem in mind, to treat of each institution, although there would be a uniform process throughout the Department. Each institution would thereby have flexibility to take account of its own peculiar problems.

Q Now, if you could, please, compare for me the position the administration of the New York City Department of Correction will be in once your study is completed, the position to make a determination about open visiting, operational lockout and extended lockout time, as compared with the position that they are now in to make such a decision?

A Well, the position that they are now in of

course is a position of making a policy decision without the hard intelligence which would enable that policy decision to be reasonably well informed.

One makes this by experience, one makes it by reference to whatever facts are available. Usually these facts are not collected and presented in a form whereby they permit of a relatively scientific decision to be made. A warden who has considerable experience in the running of an institution has quite clearly a very good yardstick on which to base his own policy decisions. But naturally such experience tends to breed caution in a person who has seen a number of difficulties arising as a result of the adoption of certain policies.

The position I hope we will be in when the classification project is completed in all its phases is that a warden or other officer in charge of a large institution will be able by reference to this information to determine what treatment he can give certain segments of the population and what treatment he must give to others. This naturally depends on the number of factors which are essentially policy determinations. There is no direct correlation between any particular part of the Department's operations and classification. Classification merely provides the rational basis for making a determination because

one knows so much better what a particular part of the population is likely to do.

Q Thank you, Professor.

MR. FRIEDMAN: No further questions, your Honor.

THE COURT: Any cross?

MR. HERMAN: Yes, your Honor.

THE COURT: You may cross.

CROSS-EXAMINATION

BY MR. HERMAN:

Q Professor Cooper, did you bring a copy of the form which you are using in your training sessions?

A I have no copy with me. I am sorry.

Q Could you tell us some of the factors that are on it that you go over with the men that you are training?

A The form itself is a very complicated form and it tries to deal with the most significant factors which are regarded or have been regarded by authorities nationally and internationally as being pointers to possible inmate behavior.

The first part of the form is concerned very largely with circumstances connected with the offense which is charged or alleged and the factors surrounding the actual

criminal activity in which the inmate is alleged to have been engaged.

The second part of the form is concerned substantially with socio-economic factors relating to his position in the community, particularly, and those factors which are suggestive of his relative social stability.

Q What would some of those factors be?

A The length of time, for example, that he had been employed, the nature of his employment, his roots in the community, the type of factors, for example, that would be taken into consideration for bailing purposes --

Q Go ahead.

A The other parts of the form are concerned more specifically with the outward evidences of his behavior and certain psychological pointers.

Q Are you referring to behavior in the institution or --

A The behavior --

Q ---or behavior on the outside?

A The behavior as it has been observed by the classifying officer.

Q Where would the classification officer observe him?

A In the course of the classification interview.

Q Now, is there a provision for input from the officers on the floor where the man is going to be housed, I guess, until you classify him?

A I would like to make clear that the document which we are using is an initial document. In other words, this gives you an initial entry classification. The classification itself is an ongoing process. It will be subject to modification, to reports by other officers, and particularly modification by professionals to whom referral might appropriately be made in a particular case.

Q So that somebody who may be classified as an A during the first interview, might eventually go to B and/or C?

A I would expect that to happen,yes.

Q After a person is there for, I imagine, thirty or sixty days, you would get to know him fairly well?

A If a person remained in the facility, yes, I would imagine that the amount of information available about that person would certainly change very considerably perhaps the initial impressions which had been gained.

Q And there would be provisions for input from officers and other people that observed the man and his behavior in the institution?

A Yes, indeed. One of the models which I used

to assist me was the type of medical model which one encounters in closed institutions where the para-medical staff, the nursing staff in particular, are trained to observe and report on certain behavior aspects of the patient with a view to assisting the medical staff in making treatment recommendation.

Q Are you planning to entrust any of this evaluation to correction officers?

A Yes, indeed.

Q Yes?

A Yes, they are the basic personnel and component of this project in its final phase; that is that the initial classification interview will be undertaken by the uniformed custodial staff.

Q Now, in your experience in South America and in your experience in New York City, you have studied inmate behavior, which I believe you stated was severe mutilation in Peru.

A Yes, indeed.

Q Have you found that a man's behavior in the institution can necessarily be predicted by looking at the crime he committed outside, that is to say, if a man committed a murder on the outside or an armed -- some kind of offense with arms, will he necessarily be a violent person,

you know, when the gun is taken away and he is in the inside, in confinement?

A Not at all. And I find that this is one factor which I took into account and which I gave very great weight. That is, that without a very careful analysis of the nature of the circumstances of the offense charged one is likely to be extremely wide of the mark in making any predictions as to the institutional conduct. This is particularly so in homicide cases. If one simply were to go, as so many present classification systems do go, upon the nature of the offense charged, one would confine, as indeed people are confined regularly by this means, to a particular floor on the basis, for example, of all being charged with the crime of homicide.

To my mind, that is quite improper as a classification device because it takes no account of the nature of the man's propensities for violence, which might be a useful predictor.

Q Professor, earlier, while you testified and Mr. Friedman asked you about operational lockout, you then said that -- strike that.

In an answer you gave earlier, you said that many problems arise or serious problems can arise in the institution from a small minority of the inmates. Now,

do you have any idea of the number of inmates -- and this includes detainees -- using that phrase in the broadest sense -- would require maximum security? What has your experience shown you?

A This would be a very fluctuating figure. I think anybody with experience of inmates when they are first inducted into an institutional setting, that even an inmate that one might be prepared after ten days to classify as a relatively slight security risk is likely to show behavior which would put him in a much higher risk category on his initial arrival at that institution. So that one has a number of factors to take into consideration in assessing the broad percentage of population that one could regard as a high risk population.

There again it is a very relative matter because it depends on the policy of the Department itself. It might be, for example, that the Department's policy is to translate all of one particular institution into a holding facility for what it considers overall to be high risk cases --

Q I am talking about --

A -- but having regard to an overall percentage of the population in relation to what experience tells is the least manageable segment of that population, I would

say no more than 20 per cent.

Q Now, Professor, in your testimony in the Tombs case and in your testimony here today, you said that while all during the study one of the considerations which had to be faced was the physical facilities that you were dealing with. In other words, the context in which your study was being done --

A Yes.

Q Could you expound on that a bit?

Have you ever been to the Brooklyn House of Detention?

A Yes.

Q Have you been to the Queens House of Detention?

A Yes.

Q Have you been through the entire building, you have seen the living areas?

A Yes.

Q In addition to the reception area?

A Yes.

Q Now, first, how would you classify those institutions in terms of the level of security?

A They are obviously high level security facilities. They were designed for an age in which perhaps different concepts of penology ruled prison architecture,

and I think this is perhaps a trite observation but this is true of all the facilities in New York, possibly with the exception of the new facilities constructed on Rikers Island. But I would not categorize them as maximum security in the sense that some of the more Bastille-like structures in New York State might be so classified.

Q In other words, they don't have a wall around them?

A Exactly, but from the point of view of security they are designed primarily to contain persons who are regarded as potentially high escape risks or who are regarded as likely to cause difficulties, managerial difficulties in an institutional setting.

Q Now, how has this affected your study? In other words, you are dealing with what you call high level security, maximum security type institutions; how has this affected the way you have gone about your study?

A Well, primarily I suppose it affected me from an economic point of view. I realized that however desirable it might be to have started theoretically from scratch and proposed a system which could be viable in a different physical environment, I realized that it would be quite impracticable to suggest a major modification of existing facilities --

Cooper-cross/Herman

Q Let me interrupt for a second now.

If you were by chance given unlimited funds, that is if the CLER Center were given unlimited funds to do your study, and you also had the operation of recommending structural changes, to make different structures more appropriate for the different levels of inmates that your classification study comes up with, what type of institutions would you suggest for detention inmates?

A I would begin by designing a totally new facility. One of the problems that I would mention here is that the physical layout of a building such as the Queens House of Detention, for example, does not permit of the type of modification that I would like to see introduced for minimum level security.

Q What would that be?

A I would like to see much less emphasis on steel and concrete. As to bars, I would like to see areas which could be supervised by relatively few officers, but not in an oppressive form.

One of the biggest problems with the traditional facility such we are familiar with from evidence in this case is that it requires a patrol down the corridor and past individual cells which are barred but which don't permit of adequate observation by the patrolling officer.

Cooper-cross

The problem is that in this as in all other operations of the department, it is a fact that one must take account of economic considerations. Modification, you see, on even that aspect, would not be possible. To take away the bars, for example, would simply cause additional security problems because of the design of the corridors themselves and the design of the cells.

The design, if you like, is wrong basically, and it is not really susceptible of very much economic modification at this stage.

Q Professor, you said that at Queens, an officer walking down -- I don't know -- And suppose, for example -- Well, can't an officer observe the cells?

A Suppose, for example, one were to remove all the bars in all the tiers, for example, this would obviously pose a security problem because it would lead to freedom of movement which would clearly pose managerial problems.

As you see, one of the basic problems of this type of institution is the management of the relatively large number of inmates by relatively small number of guards.

Q If you had an increase in supervision and population, would that make your task much easier?

A I don't think so. One can't have an excessive supervision, which again is counter-productive --

Q Let me say --

I believe you said there was a problem with having a large number of inmates, a large inmate population and a relatively small number of guards.

A From the point of view of supervision, yes.

Q From the point of view of supervision, wouldn't it be better to have more, so that there could be more thorough observation both of the security of the institution and for protecting the inmates?

A Yes indeed, but that would be counter-productive in other ways.

I would not like to see an excessive number of correctional personnel, for example, in such a way that this gave rise to tensions in the inmate population.

Q Now, can you correct me if I am wrong -- Did you say before that it was difficult for the guards at Queens to observe the inmates in their cells?

A I would say that it would be extremely difficult, one of the --

Q Why?

A One of the reasons for a compartmentalized cell structure is to break up a large inmate population into a relatively easily supervised mass , by a small number of guards.

Cooper-cross

If, as I had suggested, there were a total removal of all restraints, bars, doors, etcetera, that restraining type, then this would mean that that population would move around very freely indeed, as indeed is done in some facilities in dormitory areas. The population is not a homogenous population --

Q Well, after your classification, you know, if your classification study is adopted --

A Yes, certain areas would lend themselves to that.

Q It would?

A Yes, indeed.

Q Do you consider freedom of movement an important part of, you know, an important factor in good correction, in good penology, in other words, is it healthy for an inmate to move around?

A Uncontrolled freedom of movement?

Q Controlled.

A No.

Q You know of no freedom which is consistent with the security of the institution?

A No. I am not referring even to security. What I think is at the inmates -- that the inmate's life must be more ordered and more purposeful. I don't think that the

inmates should be confined particularly for long periods to a very small area, but again, I do not think that the answer to that is simply opening up large areas where for large periods of the day, they are doing little more than walking up and down in a larger area than they would otherwise be confined to by the present system. Something much more needs to be done than simply removing the bars and doors.

Q Professor, how long is your pilot project, your training program, going to run?

A I can only say, really, sir, until it is finished. We have put no time limit on this because a number of factors have compelled us to go slowly so as to make fewer errors that need correction and so as to in particular, to create a climate in which this could be properly implemented.

As you know, it is always very difficult to introduce something radically new in the type of structure such as one finds in the Department of Correction. The prospects of success of such aproject, are enormously enhanced if one can get the cooperation not only of the senior staff, but also of the often very overworked custodial staff on whose shoulders a great deal of these changes will have to fall.

Q Now are you going to make any recommendations

Cooper-cross

as far as the type of treatment that people in different categories that you classify them into, should get?

A In consequence of this study, no, sir.

I would mention that I am consulted by the Department of Correction in a number of areas outside of this and have been asked to give my opinion on a number of matters which are associated with this.

In other words, the type of policy decisions which I was mentioning.

Q If you were building a medium -- well, let us start with a minimum security facility for detained people after the ending of the period where you have had time to evaluate them, and you were building a minimum security institution, what types of restraints would be placed and what types of privileges would you allow that are obviously not given in a maximum security institution?

A I would not -- rather not commence with privileges, because I think any inmate is entitled to a certain minimum treatment, and we would like obviously to improve upon that minimum.

(continued on the next page.)

EK:GA
T2R4 AM

Q What is the minimum?

A But I would think that I would like to construct a facility where the ordinary inmate who is classified in perhaps the 80 percent, which I have regarded as being reasonably easily managed, would have as little restraints as possible. I should like to place very little emphasis on confinement as such, more freedom of movement, but more purposeful activity, but at the same time taking into consideration in particular the legal status of those persons, and to try as far as was consistent with security at the establishment to give them the type of living conditions that would be compatible with a person who was awaiting trial of a matter of which he were accused.

Q Professor, you mentioned at the beginning of your last answer that there are certain -- when I use the word "privileges," you said you didn't like the use of the word, that there were certain minimum, a minimum itself, or what do you want to call it, which you said were essential: Could you tell us what you referred to?

A Yes, indeed.

I think that any classification must not be based on a principle of discrimination. It must not be made -- If you like a fundamental element of such a scheme is that some persons by reason of more favorable classification, get additional privileges, such as, for example, open visiting, or

anything of that nature, what I think rather one should approach this by is that all such persons are entitled to whatever can be given in a detention, or indeed a sentence facility, unless they be shown by positive evidence to cause problems that would require restrictions to be placed upon the exercise of what I would consider to be the minimum standards of detention that should be accorded those persons. I think we should strive for those minimum standards.

Q What are some of those minimum standards that you refer to?

A Of course, I couldn't improve upon the standards of the United Nations which were laid down in 1955, and are now subject to modification in 1975. Those are perhaps ideal, but they seem to me to be at least basic requirements so far as they are obtainable for every inmate.

MR. HERMAN: I have nothing further, your Honor.

THE COURT: Any redirect?

MR. FRIEDMAN: One moment, your Honor.

Yes.

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Professor Cooper, you stated that it was your belief that 20 percent of every institution could be categor-

ized as the least manageable of the inmates therein.

Does that mean that the rest are necessarily adaptable to minimum or moderate security, as opposed to maximum?

A No, indeed, this is a very rough approximation. This would have to be attuned to the actual findings of any particular classification. Most studies have indicated that it is approximately 20 percent of any institutional population which is regarded as being the least manageable segment.

It may well be, however, that the remaining part of the population is also a relatively difficult population from a management point of view.

Q But is it also possible that 20 percent of the least manageable in one institution would pose the same problems as 20 percent of the most easily manageable in another institution?

A Oh, yes, indeed, this is the point I was trying to make.

THE COURT: I think you gave it as the over-all figure.

THE WITNESS: Yes, yes.

Q But it is relative to the institution, to the type of inmate?

A As I was explaining, the position could be altered by entirely artificial factors.

Suppose, as a matter of departmental policy, one decided to consign to a particular facility a very large number of people who were classified by my system as being highly dangerous. Clearly this would affect the proportions in that particular facility. But the over-all, the over-all percentage which there would be would be very little different in relation to the management of the institution itself. What you would have affected would have been the global operation of the department in that you would have taken the more dangerous people off the very -- well, like the top of that 20 percent, and you would put them in one particular institution, causing an imbalance in that institution itself --

Q Fine, or -- Well --

A You could do it reverse, you could take all your easy cases.

Q Right.

You stated there were certain structural changes which were ideal.

Do you know of any detention facilities in the United States which has such a structure at present?

A None.

Q And you stated that much more needs to be done in detention today.

Do you know of any detention facilities in the

United States that is doing that much more?

A Not in the United States.

Q Do you know of any detention facility in the United States which if inspected with the United Nations standards would pass that inspection?

A No.

MR. FRIEDMAN: Thank you.

I have nothing further.

THE COURT: Anything more?

MR. HERMAN: I have nothing further, your Honor.

THE COURT: It is pretty near one o'clock.

I am sorry I have to hold Mr. Guzman until the afternoon, but we will have to take our luncheon recess now.

We will resume at 2:15.

MR. FRIEDMAN: Thank you.

MR. HERMAN: Thank you.

THE WITNESS: Thank you, your Honor.

(The witness was excused.)

End of AM (A recess was then taken until 2:15 o'clock P.M.)

FK:GA
T1R1 PM

AFTERNOON SESSION 344

2:15 o'clock P.M.

J O H N A . G U Z M A N , having previously been Sworn, took the witness stand, and testified further as follows:

THE COURT: Mr. Guzman, you were Sworn last month, but you are still under Oath. Just sit in the witness stand.

CROSS EXAMINATION

BY MR. MUSHLIN: (continued)

Q Mr. Guzman, how long have you been associated with the Department of Corrections?

A I am in my twentieth year.

Q In what positions have you served?

A I am presently Assistant Deputy Warden in the New York City Department of Corrections.

Q What other positions have you held?

A Prior to being Assistant Deputy Warden, I was a Captain, and prior to that I was a Correction Officer.

Q How long were you a Correction Officer?

A About eleven years.

Q Excuse me?

A About eleven - twelve years.

Q How long were you a Captain?

A About five years.

Q And the remainder of that time you have been an

Assistant Deputy Warden? What institutions have you served at?

A I have worked at the New York City Penitentiary, at the New York City Work House, the New York City Reformatory, The Reception Classification Center, the Bronx House of Detention.

THE COURT: What was the last one?

THE WITNESS: The Bronx House of Detention, and I am presently at the Brooklyn House of Detention.

Q How long have you been at the Brooklyn House of Detention?

A Since December 2, 1971.

Q In the capacity of Assistant Deputy Warden?

A Yes.

Q And you have been in charge of programming since May of 1972, is that right?

A Yes.

Q On direct examination, if you recall, that was a week or so ago, you testified before the Court as to a number of programs, educational programs and social programs, availabl to inmates at the Brooklyn House of Detention. You recall tha testimony?

A Yes.

Q And you also testified that you are coordinator

of those programs, is that right?

A Yes.

Q And you are familiar with them, and you have been working in the Brooklyn House of Detention for a long time?

A Yes.

Q Can you tell us why in your view, with all the experience you have had, these programs are beneficial to the inmates, or can I state it, rather, Are they beneficial to the inmates, and if so, why?

A I would think they are beneficial to the inmates in that primarily it occupies their time and gives them something to do while they are waiting for Court action on their particular cases, but it also gives them an opportunity to upgrade themselves personally. Their educations, for example, we get an awful lot of inmates who come in whose reading level is low, and while they are in the Brooklyn House of Detention they have an opportunity to attend classes to raise their level.

Q Now, does the movement these programs offer to inmates, is that beneficial?

A Yes, I would say so.

(continued on next page.)

EK:m

Guzman-cross

2/1

Q Warden West testified that movement is a tension reliever. Would you agree with that?

A Yes, I would agree with that.

Q In your experience, Assistant Deputy Warden, would you say that these programs and the movement that they allow the inmates, is that helpful from a correctional point of view to the management of the institution?

A Yes.

Q Now you testified that you coordinated the problems of the Brooklyn House of Detention?

A Right.

Q So I suppose it is your job to work with what you have to do as much as possible for the inmates, given the limitations that you have to work under; is that correct?

A That is correct.

Q Do you have control over the fundings that the City grants to the Brooklyn House of Detention?

A No, I have nothing to do with funding.

Q Do you have control over the facilities that are available?

A Available in the institution; yes, sir.

Q But you have to work within those facilities; isn't that correct?

A That is correct.

Q Do you have control over the stuff at the institution?

A To a degree, yes.

Q To what degree?

A I have a number of officers who are assigned to the program divisions, and I am responsible for their assignments.

Q And you work within that limitation of the numbers that are given to you by the Department?

MR. TOBIAS: Objection, your Honor.

THE COURT: Sustained.

MR. TOBIAS: Your Honor, we would be willing to stipulate that Deputy Guzman is not the Board of Estimate and doesn't have funding powers and obviously he has to work within the limits --

THE COURT: I sustained the objection; I don't need argument now.

Q With that background, Mr. Guzman, I would like to examine some of the programs which you testified to, and I wonder if you can tell me how they could be improved if you had more funding and it were given to you, and more staff and more facilities.

MR. TOBIAS: Objection, your Honor, this is assuming that they could be improved. There

is no foundation --

THE COURT: Yes.

You asked how they could be improved. First ask whether they can be improved.

MR. MUSHLIN: All right, I will be happy to, your Honor.

Q As we go through these programs, if you can tell me, and I will be asking you whether these programs can be improved and how. For example, you had said on direct examination that there is a correctional counseling program; is that correct?

A Right.

Q Okay.

And that that counseling program, using people -- well, can you explain what that counseling program is?

A The correctional counseling program provides basically social services for the inmates; they make phone calls for them, they write letters for them, they notarize writs for them, they make referrals to outside agencies for them, they provide the inmates within the institution with the necessary things that are day-to-day needs, toothpaste, combs, toothbrushes, that type of thing.

Q You testified that out of 45 assistant

counseling positions, twenty are vacant; is that correct?

A Yes.

Q I am asking you, if you had the money would you hire the additional assistant counselors?

A Were I in control of the money, I would like to have the additional counselors.

Q Do you think that the institution could use those additional counselors?

A Absolutely.

Q You also testified that out of the four correctional counseling positions, one is vacant?

A One is vacant.

Q And I also, I assume that you would allocate money for that if you had it, and that it would be beneficial?

A I would like to see the position filled.

MR. TOBIAS: I have to object to this whole line of questioning, your Honor.

At issue is not how these programs can be improved. We have shown on direct examination that there are programs to give the inmates a certain amount of movement, to give them something to do during the day. Obviously, any program can be changed and certain changes may or may not be beneficial, but I think this is entirely speculative

and I don't think -- well, I think this is going far afield from Warden Guzman's testimony on direct examination.

THE COURT: Well, I thought there was testimony that there were twenty vacancies. I don't see why it is speculative if it is based on testimony.

MR. TOBIAS: I don't believe that counsel's questions were directed to this. He is asking general questions as to whether or not they can be improved. I don't think that is in issue.

MR. MUSHLIN: I am asking specific questions.

THE COURT: The objection is overruled.

BY MR. MUSHLIN:

Q Now, you said that out of the two supervising counseling positions in that program one is vacant; isn't that correct?

A There are four; one is vacant.

Q There are four correctional counseling positions. I believe you testified on direct examination that there are four correctional counseling positions and one only is vacant?

A Right.

Q You also testified that there are two supervisory counseling positions, and that one of those is vacant;

isn't that right?

A Yes.

Q Okay.

In the Arts & Crafts program you testified that there are two programs, that one is an experimental program on the sixth floor and the other is a regular program, if I may call it that, that takes place in the basement; you testified that twelve people are allowed in that program: Is that correct, the latter program?

A There are twelve in each session.

Q All right.

A There are two sessions daily.

Q Okay.

Now, you said that that program took place in the basement; is that correct?

A Right, in the basement area.

Q And you characterized that, I believe, as an area outside of the security system.

Could you explain what you meant?

A Outside of the security system, it is not up in the prison itself, it is down in the basement where you don't have the complete security system that you have upstairs with bars and all.

Q How do you view that area?

A It is an area where there is access to an awful lot of equipment, maintenance equipment, for example screw drivers, hacksaws, hammers, saws, that type of thing.

Q Now, let me ask you, Assistant Deputy Warden, if the basement were a secure area could you handle more people in that program?

A I might be able to handle more provided we had the space for it.

Q Okay.

On your direct examination you testified, and I quote:

"At each session we try to have not more than twelve people because this is an area outside of the security system."

So I assume if it were secured, more than twelve people could be present, given the space limitation?

A That is correct.

Q Now, you testified also as to the program run, the experimental program as being run on one side of the sixth floor. That program has been successful, hasn't it?

A I would say so, yes.

Q Would you say, judging from that program, that there are many people in the Brooklyn House of Detention

who would be interested in such a program?

A Oh, there are quite a number of them who have requested it.

Q Would you like to be able to expand that program to other floors in the institution?

A Yes, I would.

Q Now on the educational program, if we can turn to that for a moment, the high school equivalency and basic literacy, where do they take place?

A In the second floor dormitory [redacted].

(Continued on next page.)

Q And is that a secure area in the institution?

A No, it is certainly not maximum security area, no.

Q And because of that, is the enrollment limited in that program?

A Yes, I would say so.

Q In fact, because of that you have to keep the numbers down in that program; correct?

A (The witness indicated in the affirmative.)

THE COURT: What is your answer?

THE WITNESS: Yes.

Q How many teachers do you have in this educational program, I'm referring now to the high school equivalency, and the basic literacy?

A One teacher is assigned to that, and he is assisted by volunteers from the Prospects for Prison Population, Inc.

Q That is Mr. Grecco?

A Right, Joseph Grecco.

Q As such, Mr. Grecco doesn't have an English as the second language program, and what I mean by that is a separate class for Spanish-speaking inmates?

A No, he doesn't.

Q Do you know how many people pass through the

Brooklyn House of Detention every year?

I don't mean specifically, if you can estimate it, I realize you don't have those figures.

A I believe we have as between 12 and 13,000, based on a yearly basis.

Q Judging from your extensive experience in the Correctional System, can you approximate how many of these individuals would be college graduates?

A No, I can't.

Q Would there be more than a majority?

A I can't, I don't know.

Q You don't know?

A No.

Q Do you know how many are high school graduates, approximately, what percentage it is?

A I can't, I don't have that information, either, I don't have it.

Q Do you know how many are fundamentally illiterate?

A I can give you a figure that we know who were functionally illiterate, because they were enrolled in classes to help upgrade their reading levels.

Q Would you say that everyone incarcerated in the Brooklyn House of Detention has been enrolled in a program, that is, everyone that is functionally illiterate has been

enrolled in a program for the functionally illiterate?

A No, I don't think so.

Q Would you say that everyone who doesn't have a high school diploma has been enrolled in a program for high school equivalency?

A No.

Q Could you say that percentage of the people that could benefit from such a program have been enrolled in such a program: Could you approximate it?

A Of the ones who could benefit from it, no, I couldn't give you an answer.

Q Well, would you say that there is a need to expand that program?

A Excuse me?

MR. MUSHLIN: Strike that.

Would you say if a teacher allocated to you for functional illiteracy, that you could use him?

A I am sure I could.

Q If two were allocated to you for functional illiteracy, could you use them?

A Yes.

Q How about the high school equivalency, if you had an extra teacher for high school equivalency, could you use him?

A Absolutely.

Q Now, you testified as to a pre-vocational program. Is that a program for sentenced help?

A No, it is for detentioned help.

Q For detentioned help.

Are sentenced help enrolled in it, sentenced prisoners?

A I don't know if we had any, I don't believe so. I think it is strictly detention.

Q Now I gather from your testimony that an inmate who is interested in a program and wanted to enroll would drop a slip in one of the boxes on the housing floors; is that right?

A Yes.

Q And is it one of your functions to pick up that slip?

A That is normally brought down by the Correctional Officers assigned on the 4:00 to 12:00 tour, and they are left in the mailbox and I pick them up in the morning when I come in.

Q You sort them and then take action on them?

A Yes, sir.

Q So it would take some time to put someone on a waiting list, for you to take some action and to place him on a waiting list?

A Yes, it would.

Q The gymnasium is located on the 11th floor; is that right?

A Yes, the gymnasium is located on the 11th floor.

Q Now, you told us about the recreational program last time you were here, and you told us that that program was operational; is that right?

A Yes.

Q And you also told us that if an inmate is on a particular floor, you don't have to go to the gym during the day that that floor is assigned to the gym?

A That is right.

Q And I believe you testified that about thirty inmates, more or less, actually used the gym during that period?

A Right.

Q For each particular floor, out of a floor?

A Yes.

Q I suppose, therefore, just as a matter of arithmatic, that it is fair to assume that many inmates never use the gym?

A That is true.

Q And would it be fair to say that many inmates don't wish to go to the gym because it is not large enough to accommodate an entire floor at one time?

A I don't know if that is the reason they don't go.

Q Is that one of the reasons?

A It could be, yes.

Q Didn't you testify on direct examination that at one time you were taking everyone who was on each floor up to the area, meaning the gym, but that the area isn't really big enough to accommodate them, and consequently, "We now use a volunteer participation system."

A Yes.

Q I assume from that statement that your volunteer participation system is in operation because the gymnasium isn't big enough for the entire floor at one time; is that right?

A Yes.

Q Would it be fair to say that possibly more people would use the gym if you had more space?

MR. FRIEDMAN: Objection, your Honor.

THE COURT: He can answer if he knows.

A I imagine they would use it if it were larger.

THE COURT: Don't "imagine."

Is that your best judgment?

THE WITNESS: I believe so.

THE COURT: What is your best judgment?

THE WITNESS: I believe they would if it were a larger area.

Q Now, there has been testimony in this case, Mr. Guzman, that there is an area on the 10th floor that has been labeled the 10th floor, I believe, dormitory, and that that area --

A Yes.

Q (continuing) -- was formerly a gymnasium; isn't that right?

A Yes.

Q Now, if that area were to be reconverted to a gymnasium, I suppose it could be used as such; is that correct?

A Yes.

Q Is the gym adequately heated?

A No, it is not.

Q Is that one reason, is that possibly one reason that people do not go there?

A Yes, that is one of the reasons that it is not used.

Q I would like to direct your attention to the people who are incarcerated in the punitive segregation areas of the institution.

Are they allowed to go to the gymnasium?

A You are referring to the punitive segregation area?

Q Yes.

A Not while they are in prison segregation.

Q Are they allowed to participate in any of the programs?

A No, not while they are in the punitive segregation area.

Q Now, you said that there are plans to conduct a law library and place it on the second floor?

A In the second floor dormitory.

Q In the second floor dormitory.

Incidentally, when you say second floor dormitory, is that area derived from the fact that it was used as a dormitory at one time?

A I can't really tell you if it were used as a dormitory, I wasn't there then, it had that designation when I came to the institution.

Q I see.

Now, where are the $25,000 worth of law books?

A I have them in the storehouse.

Q Are they available for use by the inmates?

A Not while they are in the storehouse, no.

R3 fls (continued on next page.)

EK:GA
T2R3 PM

Q How long have you been waiting for the Department to construct that library on the second floor dormitory area?

A Nine months, possibly a year.

Q Would you like to have that library in operation?

A Very much, yes.

Q Now, I assume that you -- You testified that you had no control over the funding of the institution. Obviously, I just assume that you had no control over the number of inmates that are assigned to the Brooklyn House of Detention; isn't that right?

A I have no control over that.

Q Would it be fair to say that one of the problems you have in delivering services to the inmates is the fact that the facility holds more people than its stated capacity?

A Than its original capacity. Yes, that is one of the problems.

Q Have you ever heard of Arthur Rubin?

THE COURT: Who?

MR. MUSHLIN: Arthur Rubin.

A Deputy Warden Rubin?

Q Yes, he is now the Warden at the Queens House of Detention; is that right?

A Yes.

Q In your opinion, is he a knowledgeable Correction

Officer?

A Absolutely.

Q Now, Warden Rubin, when he was here, testified that he once said that overcrowding is one of the problems facing Corrections people at the Brooklyn House of Detention.

Would you agree with that statement?

A Yes.

Q He also testified, when he was here, he said that if he had a magic wand, one of the things he would do would be to provide more room, I think he said more breathing space for the inmates: Would you agree with that?

A Yes, I would agree with that.

Q Now, a lot of the programs you testified about are conducted by volunteers, such as Volunteer Clergymen, and I believe you referred to a Mr. Leroy Giles?

A Yes, Leroy Giles of the Theatre for the Forgotten.

Q Of the Theatre for the Forgotten?

A Right.

Q If a qualified drama teacher such as Mr. Giles, or a Volunteer Clergyman were to come to you and say, Assistant Deputy Warden Guzman, I would like to offer my services, could you accommodate him?

A Depends on what services he offers.

Q Okay.

Q What if a qualified teacher came?

A A qualified teacher came and volunteered his services gratuitously?

Q Yes.

A I think I could find room for him.

Q You think it would be worthwhile?

A Absolutely.

Q Is one of your jobs compiling statistics as to the number of people serviced by the various programs?

A Would you repeat that?

Q Yes, sure.

I'm asking you, Is it one of your duties as coordinator of programs -- I was just wondering if one of your duties is to compile statistics as to the programs that you have, and the number of people serviced by them?

A Yes.

Q Do you know how many people are serviced by the New York Correctional Association in their program of offering civil legal assistance?

A Civil legal assistance is one of our newer programs, and presently they are reaching a small number within the institution. They only have one worker from that organization, Jerry Rosenbloom is the name, and of course he is limited, being only one man --

Q Sure.

A So he is reaching a small number.

Q Do you think if another attorney, could another attorney, were another attorney allocated to the Brooklyn House of Detention, would there be such a need for him?

A Yes, there is definitely a need for him.

Q Warden Rubin testified that in Brooklyn -- I'm sorry, in Queens, he also has the same situation of an attorney coming in --

MR. FRIEDMAN: Your Honor, counsel is testifying.

THE COURT: He is trying to have the witness agree with Warden Rubin.

MR. MUSHLIN: Your Honor, I haven't asked my question yet.

THE COURT: That is why Mr. Friedman objects, because you are giving a lot of background before you ask a question.

What is your question?

MR. MUSHLIN: My question was, your Honor:

In Queens, between 15 and 20 people were serviced by the New York City Correctional Association every month:

Would it be fair to say that the same situation prevailed in Brooklyn?

THE WITNESS: That would be pretty close.

MR. MUSHLIN: All right.

Q Now, your educational program, let me ask you this, that program, I believe, takes place during the lock-in period?

A Which program, there are a number of educational programs?

Q The high school equivalency and basic literacy, do they take place during the lock-out period?

A During the lock-out period, yes.

Q No educational programs take place --

Those two educational programs don't take place during the lock-in period?

A No, not those two.

Q What about the arts and crafts program?

A That takes place during the lock-out periods.

Q As well as -- Well, you were talking about the museum program, one on the sixth floor, and one in the basement?

A Right.

Q Is it fair to say, then, that it is a general policy in programming in the institution that they occur during the lock-out periods?

A Yes, sir.

Q Now, aside from the school program and the drama

program and the arts and crafts program, the other programs are primarily concerned with counseling; isn't that correct?

A Right.

Q Do any of these -- Well, let us take it specifically, the high school equivalency program, does it meet during the weekend?

A We are giving the examination, for example, this coming weekend; the high school equivalency test if being given this weekend.

Q Do instructions take place during the weekend?

A Not ordinarily.

Q As a matter of fact, do they ever take place during the weekend, instructions?

A Not that I am aware of.

Q What about the basic literacy program?

A They are not normally weekend projects, Monday to Friday.

Q What about the drama program, is that the same?

A That is only once a week, on Tuesday.

Q The arts and crafts program?

A That is daily, Monday to Friday.

Q I see.

What programming -- Let me ask you this: The Correctional Counseling Program, that takes place between

Monday and Friday, also; isn't that right?

A Yes.

Q Aside from religious services, what activities take place off the housing floors for inmates during Saturdays and Sundays?

A Well, Saturday morning you have regular attorney visits. For the sentencing inmates, we have recreation on Saturdays and Sundays, during -- Well --

Q For the sentenced? I am sorry, for the sentenced, did you say?

A For the sentenced.

Q For the pre-trial people I assume there is not?

A No.

Q Have you finished with your answer?

A Yes.

Q Okay.

How often do you report to Warden West?

A Daily.

Q How many Correction Officers are assigned to the classroom area, to the high school equivalency program?

A To the high school equivalency program, there are three Officers in that area.

Q Would it be the same for the basic literacy program?

A Right. They serve other functions in that area. That second floor dormitory is directly over the Arraignment Part of the Supreme Court, and they serve both functions, they run both the security for the dormitory area and from the Courts.

Q What about the drama program, how many people?

A That is held in the same area, the same number of Officers.

R4 fls

(continued on next page.)

EK:GA
T2R4 PM2

Q Is that three, did you say?

A Three.

Q What about arts and crafts? Is that in another area?

A That is run by one Officer.

Q Now, how often does the high school equivalency program meet?

A They meet daily.

Q You mean --

A Monday to Friday.

Q That is five times a week during a two-hour period?

A Right.

Q What about the basic literacy, how often do they meet?

A The day is usually split up into two halves, basic literacy for the first two hours, or the second two hours, and the high school equivalency program will share the rest of the day with them.

Q Now a set of interrogatories, replies to interrogatories, were prepared in this case.

Did you participate in the preparation of any portion of that?

A Yes, I did.

Q In those interrogatories, there is a response that the basic reading program meets four times a week, Monday through Thursday.

Now, can you explain?

A No, that is a mistake, they meet every day.

Q That is in error?

A They meet five days a week.

Q I also direct your attention to the interrogatory which states that the high school equivalency classes meet three times a week.

That is error?

A That is not accurate.

Q That is not correct.

In discussing the number of Correction Officers assigned to each program, it states that for the basic reading program five Correction Officers are assigned to the program. I believe you testified it was three?

A Right, there are three men assigned there.

Q So the five would be in error?

A There are five men in that area --

Q I see.

A Two men work the outside gates, three men are in with the program. You have to go through a series of gates to get into that area.

Q All right.

Now, you testified on direct examination that in the drama program there are ten people in the group, in the interrogatories it states that seven are enrolled in a group.

Is that in error?

A It may have been at that time, presently there are ten in each.

BS fls

(continued on next page.)

Valvano
2pm BS/nc

CROSS-EXAMINATION

BY MR. MUSHLIN: (Cont.)

Q If you could provide some of the programs that you have testified to, if they could be made available during the lock-in periods, would that be beneficial, in your opinion, if that could be done?

A Well, it's kind of difficult to run any kind of program while they are locked in.

Q Sure, I understand that. I am asking you now purely as a hypothetical question if all the problems that you may -- let's say it this way: If it were possible to provide programs during those hours, 11:00 to 1:00 and 3:00 to 6:00, would that, in your opinion, be beneficial to the inmates?

MR. TOBIAS: I object to this question. The Deputy Warden has already testified that it would be difficult in his opinion to envision such a possibility. So I feel he's given his answer.

THE COURT: It is a difficult question. I will overrule the objection.

A The lock -in periods are used for for a very specific purpose, normally the feeding, they have to have their meal, so to have any kind of program going on while the meal is in progress would be kind of difficult.

Q There has been testimony that there is a lock-in period for approximately three hours during the afternoon, and there has been no testimony that it takes three hours to eat dinner.

MR. TOBIAS: Objection, your Honor.

THE COURT: Overruled. Go on.

Q If the eating activities didn't take the entire lock-in period, would it be beneficial if during the other times programs could be provided, would that be beneficial to the inmates?

A All conditions being ideal, I imagine it would be -- I believe it would be beneficial.

Q Why do you think it would be beneficial?

A Well, anytime that we can utilize the mens' time constructively that is beneficial.

MR. MUSHLIN: Nothing further.

THE COURT: Any redirect?

MR. TOBIAS: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. TOBIAS:

Q Deputy Warden, with respect to the educational programs that you have outlined for us, both last week and today, how long would you say the waiting list for these programs is?

A I would say that for the high school equivalency program we have about 25 men waiting all the time, waiting to go into the next group.

We draw from that 25 constantly, replacing men who are discharged for any reason, and I can't give you --

Q How long would it take the 25th man on the list, that is, the last man on the list, to get --

A That depend on the turnover.

Q On the average, would you say?

A It could be anywhere from a week to a month, two months. It depends on what kind of turnover we have.

Q Would a more than two-month waiting period be unusual in your experience?

A Yes.

MR. MUSHLIN: That's a leading question, your Honor.

THE COURT: Sustained.

I will let it come in anyway.

A Yes.

Q Now, in your opinion, do you feel that the inmates are aware of these programs, these educational programs, specifically?

A Yes, they are aware of them.

Q In your opinion and using your experience, would

you say that certain inmates might not be interested in participating in these programs even though they might not have had educational training themselves?

A Yes, I would agree with that.

Q I believe on cross-examination, Deputy Warden, you testified that many of these programs, or in fact, most of these programs don't function during Sundays.

Would you then say that in your opinion Sunday would or would not be a representative day?

A Sunday would not be a representative day, not at all.

Q So you say that if I came to visit your institution on Sunday or even on a Saturday, would it be not fair to say that I wouldnot get an accurate picture of the programs functioning in your institution?

A Yes, that is correct.

You couldn't get a true picture of the institutional life on a Sunday.

Q There has been some discrepancy in the number of inmates participating in programs as stated in the interrogatories and as stated in your testimony.

I would just like to know generally, do the number of inmates in these programs fluctuate on a week-to-week basis?

A Yes. They fluctuate, I would say, on a day-to-day basis.

Q Would you characterize this fluctuation maybe a little more specifically?

A Every day during the week we send people to clinics, to hospitals, to court, to other institutions, they are bailed out, they are released for any number of reasons; the number can change constantly.

MR. TOBIAS: Nothing further.

THE COURT: You spoke about the gym not being adequately heated. What is the reason for that?

THE WITNESS: The heater that they have in the gym -- to start with, that was originally a roof, that was not the gym when it started out. The gym was the area that we use as the dormitory on the 10th floor.

Later on, after the institution was built and staffed they decided to enclose the roof and turn it into a gymnasium.

The heating system that they put in is just simply not adequate, it does not blow out enough heat. The heating units are up on top. I'm sure we are all aware that heat rises, so the floor is consequently never really warm.

THE COURT: Are there any plans to change the heating system?

THE WITNESS: I can't answer that. I don't know.

THE COURT: All right. Anything more or Warden Guzman.

MR. MUSHLIN: No, your Honor.

THE COURT: Step down. Thank you.

(Witness excused.)

THE COURT: Mr. Friedman, have you or Mr. Tobias any other witnesses?

MR. FRIEDMAN: No, your Honor, we rest.

THE COURT: I understood last time that you did have a cople of more, but you don't have to produce them.

MR. FRIEDMAN: No, we were speculating about the possibility of doing so.

THE COURT: Is there anything more from the plaintiffs.

MR. HERMAN: No further witnesses, your Honor.

THE COURT: All right.

MR. HERMAN: I have a couple of housekeeping matters.

THE COURT: Do defendants rest?

7 MR. MUSLIN: Yes, your Honor.

THE COURT: What are the matters to take up, Mr. Herman?

MR. HERMAN: The first, your Honor, is following Warden Rubin's testimony we subpoenaed the daily count sheets for one week for the Queens House of Detention and these have been delivered -- these were delivered to us and we would like them marked in evidence.

THE COURT: They look like quite a bundle for me to read, if you put them in evidence. You ought to have some analysis of them.

MR. TOBIAS: That's exactly what I was going to say, your Honor. We have no objection or no comment on the authenticity of these documents, they are authentic. The problem is having gone over them this morning, I see that they would really serve this court no useful purpose. They basically are a count of the number of inmates taken during each head-counting period and without a breakdown as to what these figures mean, I can't see them being of any usefulness to this Court.

MR. HERMAN: Your Honor, we would disagree. We think that they are self-explanatory and we think that in conjunction with Warden Rubin's testimony we

could make, you know, sense out of the census at various hours.

THE COURT: If you are going to be writing a brief and can refer to them so Mr. Tobias can counter anything you say about them, I suppose that I may justify it.

MR. HERMAN: Yes, your Honor.

THE COURT: Let me look at one of them.

MR. TOBIAS: Any of them would be sufficient. I don't think you could come to any conclusion from reading that document, your Honor. Except that on a given period of time there was that number of people on that given floor.

MR. HERMAN: That's exactly the point, your Honor.

THE COURT: It has a summary sheet that gives the total for each day.

MR. HERMAN: And the hour, and that's what we are interested in, your Honor.

THE COURT: I don't understand what the significance is of the count of spoons and utensils and bowls, but I suppose I don't have to look at all of it.

MR. TOBIAS: I think our interrogatories and the stipulations that we are providing to the Court,

give an actual picture as to how many inmantes are in the institution.

MR. HERMAN: This is how many are in the institution during the day. There has been discussion that certain amount of people leave the institution and certain are there during the day. We wanted to get the figures for a week.

THE COURT: I will let them be marked in evidence.

MR. TOBIAS: Even if you run a comparison study on the number of people in the institution for one hour as opposed to the next hour, I don't think it's possible looking at these documents to tell the reaons for any discrepancies, otherthan there are discrepancies in the total figures.

THE COURT: Even that may be of some significance.

MR. TOBIAS: What would be the purpose of showing a discrepancy in figures?

MR. HERMAN: We haven't said we are going to show any discrepancy. I don't know of any particular discrepancy myself.

I want to have figures which show how many men are in the institution during the daytime hours. There has been testimony to that and here is an

accurate sample. We asked Warden Rubin for those figures and he was able to give us the exact count sheets.

THE COURT: Mark them in evidence. It's background material that counsel can use.

Objection overruled.

MR. HERMAN: Thank you, your Honor.

THE CLERK: Set of 46 count sheets marked Plaintiff's 9 in evidence.

(So marked.)

xxxxx

MR. HERMAN: Secondly, your Honor, we have prepared a stipulation, again, it is mostly background facts about the institution, the information taken mostly from the interrogatories, which -- the one for the Queens House of Detention, is complete. Mr. Friedman has -- both of them are missing a couple of items which Mr. Tobias and Mr. Friedman have said they will provide us during the next week.

We would like to offer them as exhibits.

THE COURT: Have they been signed?

MR. HERMAN: With the proviso --

THE COURT: Have they been signed?

MR. FRIEDMAN: No, your Honor .

THE COURT: Then they are not stipulations.

MR. TOBIAS: Correct.

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MR. FRIEDMAN: We will agree to put them into evidence at the time when they are completed and signed.

MR. HERMAN: We would like to leave the record open --

THE COURT: All right.

We will keep the record open so that the stipulations can be signed and submitted.

MR. HERMAN: That's all we have, your Honor.

MR. FRIEDMAN: Your Honor, I would like to say one thing also, you had inquired about the department's proposals, if any, to relieve overcrowding. We have spoken with the Commissioner about that and we intend to submit to your Honor those proposals, but not as a defe nse or as a stipulation of settlement, because we do not feel a constitutional case has been made herein, but only to guide your Honor, should you come to any decision, you might want to be guided by the department's present plan.

THE COURT: You have rested. Now, you are talking about additional evidence.

MR. FRIEDMAN: As I said, it is not offered as a defense nor as a stipulation of settlement, it is only offered that should your Honor decide that it is necessary, that the plaintiffs have met their

burden and proved by a preponderance of the evidence that overcrowding is a constitutional deprivation to them, and your Honor feels compelled to order the department to take certain steps, this may be a guide to your Honor knowing what the department itself is planning to do.

THE COURT: I will receive them anyway. When will they be ready?

MR. TOBIAS: In a matter of weeks.

THE COURT: Weeks?

MR. FRIEDMAN: Yes.

THE COURT: How many weeks?

MR. FRIEDMAN: Two weeks at the most.

THE COURT: Send them to me, and to Mr. Herman when they are ready.

MR. FRIEDMAN: Fine.

THE COURT: Do you want any further briefing, Mr.Herman?

MR. HERMAN: Yes, your Honor.

THE COURT: How long do you want for that?

MR. HERMAN: Could we have a month?

THE COURT: Well, I can keep busy on other things during a month without any problem. That would be March 7.

MR. HERMAN: Yes, your Honor. Thank you.

13 THE COURT: Do you want any time to answer, Mr. Friedman?

M MR. FRIEDMAN: We would like two weeks thereafter, your Honor.

THE COURT: All right.

March 21 for defendants' reply.

I had mislaid my class action order, but I got a note today that there was a form being -- form of notice being prepared which would combine the Jenkins-Wallace and Funches cases in Brooklyn House of Detention.

MR. HERMAN: That is correct, your Honor.

THE COURT: My letter was from Mr. Gugliemetti, who is in the Funchez case.

MR. HERMAN: I spoke to him the other day, your Honor, and he has sent a letter to Mr. Bernakow -- I believe he had something to work out in Funchez with Mr. Bernakow and as soon as that was straightened out I was going to meet with him and with Mr. Alterman to come up with a joint notice which would then be submitted to the Corporation Counsel.

THE COURT: See if you can get it out in the next ten days, maybe, and we will --

MR. HERMAN: I don't think there will be any problem.

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THE COURT: And we will try to include it in the order. I am glad that everybody was able to come.

Is there anything else that I should consider before we go?

All right. Thank you.

(Whereupon, at 3:10 o'clock p.m., the hearing was closed.)

* * * *

Queens Exhibit 7

(See opposite) ☞


3

Queens Exhibit 7

(See opposite) ☞


12

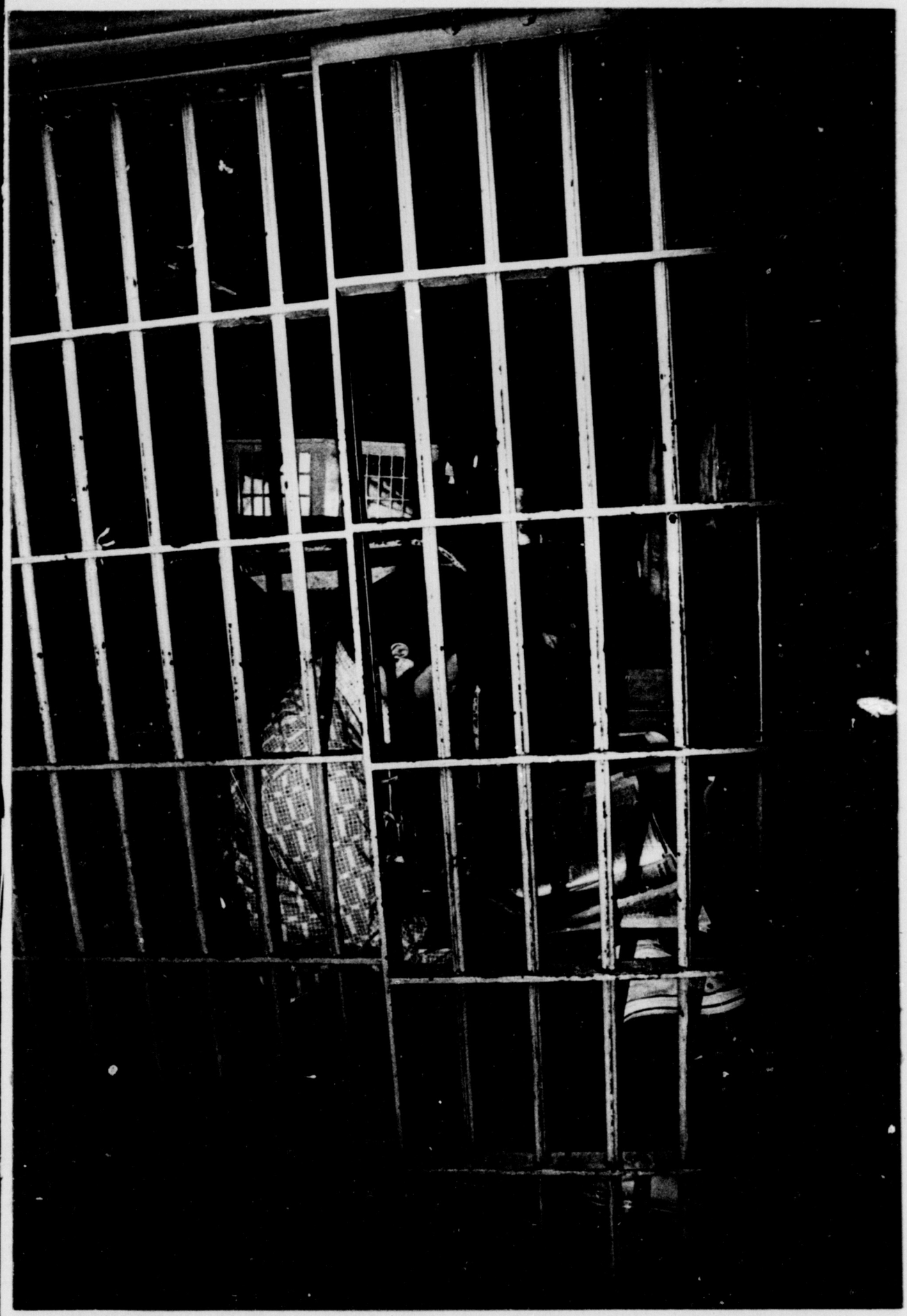
Brooklyn Exhibit 8

(See opposite) ☞



Brooklyn Exhibit 8

(See opposite) ☞



Brooklyn Exhibit 8

(See opposite) ☞



Stipulation of Facts (Queens House of Detention)
Dated March 6, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 70 C 1390

VALVANO, *et al.*,

Plaintiffs,

—against—

BENJAMIN MALCOLM, *et et.*,

Defendants.

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, by their respective attorneys, that the following facts are true:

1. Detainees at the Queens House of Detention are housed on the third, fourth, fifth and sixth floors of the institution. The fourth and fifth floors are divided in four sections ("A", "B", "C" and "D" Sections). The sections are divided into an upper and a lower tier with each tier containing fifteen cells. The third and sixth floors differ only in that one section for each floor contains a dormitory rather than cell tiers.

2. The stated capacity of the Queens House of Detention for Men is 520 inmates..

Stipulation of Facts (Queens House of Detention)

3. The average daily population for the Queens House of Detention was the following:

Year	*Population*
1969	911
1970	893
1971	633
1972	799

4. The average daily population for the Queens House of Detention was the following for each of the months in 1973:

Month	*Population*
January	785
February	798
March	778
April	739
May	696
June	690
July	683
August	714
September	720
October	709
November	643
December	677

5. The average length of stay at the Queens House of Detention for detainees charged with misdemeanors is three to six weeks; for detainees charged with felonies is three to nine months; for detainees charged with homicide is nine months to two years.

6. The population of the Queens House of Detention on February 5, 1974 was 600.

7. The average number of sentenced inmates in the Queens House of Detention is eighty (80). Sentenced inmates perform work duties in the institution and are housed in the third floor dormitory.

8. There are 360 cells in the Queens House of Detention; each cell is eight feet long by five feet wide by eight feet high.

9. Each cell is furnished with one table, one seat, one toilet, one sink, one mirror and two bunk beds.

10. The lock-out corridor for each tier on housing floors in the Queens House of Detention is eighty feet long by five feet wide.

11. The dayroom area for each section of a housing floor measures twenty-seven feet seven inches long by twenty feet four inches wide.

12. The gymnasium (chapel auditorium) measures forty-two feet 8 inches long by eighty feet six inches wide.

13. The library on the eleventh floor is forty-two feet eight inches long by eighty feet six inches wide.

Stipulation of Facts (Queens House of Detention)

14. The outdoor roof area measures forty-two feet wide by sixty-six feet; one-half inches long.

15. The classroom area measures twenty-two feet two inches long by thirty-nine feet nine inches wide.

16. The two dormitories on the third floor each measure eighty-one feet long by seventeen feet one-half inches wide.

17. The two dormitories on the sixth floor each measure eighty-two feet long by seventeen feet one-half inches wide.

Dated: Brooklyn, New York
March 6, 1974.

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Stipulation of Facts (Brooklyn House of Detention)
Dated March 6, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 73 C 261

DETAINEES OF THE BROOKLYN HOUSE OF DETENTION, *et al.*,

Plaintiffs,

—against—

BENJAMIN MALCOLM, *et al.*,

Defendants.

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, by their respective attorneys, that the following facts are true:

1. Detainees at the Brooklyn House of Detention are housed on seven floors of the institution. All floors except the third and tenth floors which have only two sections, are divided into four sections ("A", "B" and "D" sections). The sections are divided into an upper and lower tier, with each tier each containing fifteen cells.

2. The stated capacity of the Brooklyn House of Detention for Men is 814 men.

3. The average daily population for the Brooklyn House of Detention was the following:

Stipulation of Facts (Brooklyn House of Detention)

Year	*Population*
1969	1,471
1970	1,478
1971	1,391
1972	1,471

4. The average daily population for the Brooklyn House of Detention was the following for each of the months in 1973:

Month	*Population*
January	1,277
February	1,276
March	1,315
April	1,296
May	1,256
June	1,255
July	1,232
August	1,161
September	1,072
October	1,107
November	1,062
December	1,008

5(a) The number of detainees at the Brooklyn House of Detention on December 4, 1973 with cases pending in Criminal Court is indicated below with corresponding lengths of incarceration:

30- 60 days	—	3
60- 90 days	—	22
90-120 days	—	6
120 days-6 months		15
6 months-1 year	—	12
over 1 year	—	0

(b) The number of detainees at the Brooklyn House of Detention on December 4, 1974 with cases pending in Supreme Court is indicated below with corresponding lengths of incarceration:

30- 60 days	—	120
60- 90 days	—	100
90-120 days	—	61
120 days-6 months		85
6 months-1 year	—	130
over 1 year	—	75

6. The population of the Brooklyn House of Detention on February 5, 1974 was 1087.

7. The average number of sentenced inmates in the Brooklyn House of Detention is ninety-five (95), sentenced inmates perform work duties in the institution and are housed on the "A" and "D" sections of the fourth floor.

8. There are 814 cells in the Brooklyn House of Detention; each cell is seven feet eleven inches long by five feet eight and one-half inches wide by eight feet one-half inches high.

9. Each cell is furnished with one table, one seat, one toilet, one sink, one mirror and two bunk beds.

10. The lock out corridor for each tier on housing floors in the Brooklyn House of Detention is ninety-seven feet ten inches long by four feet ten inches wide.

11. The day room area for each section of a housing floor measures twenty-four feet eight inches long by twenty-one feet wide at the front, by thirteen feet four inches wide by eighteen feet high at the rear.

Stipulation of Facts (Brooklyn House of Detention)

12. The Gymnasium on the eleventh floor measures fifty-nine feet nine inches long by fifty feet ten inches wide and is divided by a wall into two areas.

13. The Theatre on the eleventh floor is sixty-two feet ten inches long by thirty feet two inches wide.

14. The outdoor roof measures sixty-nine feet long by thirty-eight feet wide.

15. The second floor dormitory classroom area measures sixty-nine feet by twenty-three feet.

16. The basement measures thirty four feet by forty-one feet.

17. The tenth floor Gymnasium dormitory measures thirty-eight feet seven inches long by thirty-five feet wide by twenty-five feet five inches high.

Dated: Brooklyn, New York
March 6, 1974.

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Memorandum of Decision and Order
Dated July 31, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

July 31, 1974

Appearances:

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MARIAN PROBST, Esq.
Assistant Corporation Counsel
of Counsel

JUDD, *J.*

MEMORANDUM OF DECISION AND ORDER

Two major issues were tried before the court in this prisoner civil rights action. The first related to overcrowd-

ing, particularly the confinement of two men in a single cell, and the second related to alleged excessive confinement because of inadequate time out of the cells (lock-out), the requirement that detainees eat meals in the cells, and inadequate recreation and dayroom facilities.

Facts

The *Valvano* action, relating to Queens House of Detention (QHD), and the *Detainees* action, relating to the Brooklyn House of Detention (BHD), involve similar issues and were consolidated for trial. The court heard eleven witnesses on behalf of the plaintiffs and four for the defendants, as well as receiving a number of exhibits. A considerable mass of material accumulated in earlier phases of the actions has also been considered.

Structure and Facilities

The Brooklyn and Queens Houses of Detention are multistoried institutions. Although both are relatively recently constructed, they embody concepts of penology different from those now commonly held, and are basically maximum security institutions, although only a fraction of the detainees require maximum security.

The housing floors of BHD and QHD are each divided into four quadrants, with two tiers of fifteen cells, one above the other in each quadrant. These cells have solid walls but steel bar fronts and gates, opening onto corridors about 90 feet long and 5 feet wide. There is one shower for each tier.

Each section of two tiers shares a single dayroom, with an area of approximately 425 square feet at BHD and 550 square feet at QHD. Each quadrant is sealed off from the other sections on the same floor so that detainees cannot move from one part of the floor to another.

All cells are approximately 40 square feet in area, furnished with two bunk beds, one table, one immovable seat, one unenclosed toilet and one mirror. There is one shower for each tier. There are no closets. Lockers which previously existed at QHD were destroyed or damaged by the inmates during the 1970 riots and have not been replaced, allegedly for security reasons. Inmates at the Federal House of Detention (FHD) at West Street are provided with lockers.

In BHD detainees under mental observation are housed in a dormitory in the former 10th floor gymnasium. In QHD there are two dormitories capable of housing 80 men each; one is used for sentenced prisoners who do household and kitchen chores and the other is vacant. In BHD 95 sentenced inmates who work in the institution are housed in cells.

Each institution has a gymnasium and theatre auditorium and an enclosed roof recreation area. The largest of these rooms is approximately 3,400 square feet. There are classroom areas and libraries in both institutions.

Overcrowding

The rated capacity of BHD is 814 and of QHD 520. This is based on single occupancy of cells with all cells filled.

The average rate of occupancy for the years 1969 to 1973 was 170 percent of capacity at BHD and 153 percent of capacity at QHD. Occupancy has dropped during the pendency of this action. At the time of the hearings in late January, there were 998 inmates or 23 percent above capacity at BHD and 670 inmates or 29 percent above capacity at QHD. Actual overcrowding was substantially greater because 90 cells in BHD are usually unused and one dormitory and 40 cells are not in service at QHD. Conse-

quently, the normal practice in both institutions is to house two men in a cell.

Confining two men in a space of 40 square feet creates personal problems. They may not be "horrors" as plaintiffs assert, but even one of the wardens has characterized the practice as "sort of dehumanizing." Two men cannot move about at the same time in the portion of the cell which is not utilized for bunks, table, seat, and toilet. Since the meals are fed to inmates in the cells and there is only one chair, only one man can use the table and the other must sit on the bed to eat; the choice of who eats on the bed is made in varying ways, depending on seniority, rotation, strength, or other factors. Disagreements concerning the choice of activities, embarrassment and discomfort in the use of the toilet in the presence of a cell-mate, and disagreements concerning personal belongings are common. Fights and charges of theft are frequent, although fights between inmates who do not share cells are also common. Loss of privacy is one of the major results of double celling.

Most inmates stated a preference for living alone in a cell, although some inmates actually prefer having a cell-mate. Some had been in state institutions where inmates were housed one in a cell, and spoke particularly of the lack of privacy at the city institutions. Experts testified that long confinement together increased homosexual impulses.

Complaints by the newly formed inmate councils have not focused on double-celling, but this may have been because correction of the condition is not within the power of the individual wardens.

The dayrooms were constructed to accommodate the needs of the institutions under conditions of single cell occupancy.

With 60 men in a quadrant, two to a cell, instead of just 30, the dayrooms are unduly crowded. Warden West of BHD admitted that there were not enough chairs for everyone to sit. He would prefer to limit cells to a single person, given the ability.

On week days, many inmates are not in the dayrooms because they may be making court appearances or may be participating in some of the other activities which are available, but on Saturdays and Sundays most of the activities are suspended.

The undesirability of double-celling was confirmed by Dean Robert B. McKay of New York University Law School, who was serving as Chairman of the Board of Correction of the City of New York. He had previously been Chairman of the New York State Special Commission on Attica. He stated that in his experience all correctional professionals considered it "inadvisable" to confine two persons in a single cell and that

> The city did it not because it is desirable, but they considered the necessity of the circumstances. I think there is uniform conclusion that it is an undesirable fact.

The Manual of Correctional Standards issued in 1966 by the American Correctional Association, states (p. 49):

> All cells should be designed for the use of one prisoner. The minimum clear size of an interior cell should be approximately 50 square feet, with an elevation of not less than 8 feet.

In the case of squad rooms or dormitories, the Standards recommend that they have a capacity of not less than four nor more than fifty inmates and that

> the ceiling height should be at least ten feet and at least 75 square feet of floor space should be available for each prisoner.
>
> . . . and a minimum of one shower head for each fifteen inmates or fraction thereof.

The Committee which drafted the Standards, as a revision of the 1959 Manual, included the Director of the United States Bureau of Prisons, the Chairman of the New York State Board of Parole, Russell G. Oswald, and the Commissioner of Corrections of the City of New York, Anna M. Kross. The Manual does not have the force of law, and its 600-odd pages of recommendations are not in full effect in any state.

The United Nations' Congress on the Prevention of Crime and the Treatment of Offenders adopted in 1965 a set of Standard Minimum Rules for the Treatment of Prisoners. These rules also recommend that each prisoner have an individual cell, and at least one hour of suitable outdoor exercise daily, weather permitting.

No defense witness stated that double-celling was desirable.

The defendants' brief attacks the credibility of the inmate witnesses and the qualifications of the experts. It is true that all the inmate witnesses had prior convictions before their current arrest, and that some had not complained earlier about double-celling. It is also true that Dean McKay never supervised a correctional institution, but this does not alter the fact that in his statewide studies and in his New York City experience he had found no defenders of double-celling. Mr. Goff, whose testimony confirmed that of Dean McKay, was acting superintendent of

two New Jersey reformatories, Director of Classification and Education in the New Jersey Bureau of Correction, and General Secretary of the Correctional Association of New York, among other posts, before becoming Director of the Prisoners' Rights Project of the United States Commission on Civil Rights.

The court has also given weight to the testimony of Dr. Augustus Kinzel concerning the psychiatric effects of confinement without accepting his specific computations concerning the "buffer zones" required by violent and non-violent prisoners.

The overcrowding of dayrooms at BHD and QHD is related to the practice of double-celling. The Manual of Correctional Standards of the American Correctional Association recommends (p. 49):

> The housing unit should be so designed as to provide approximately 75 square feet per inmate, including the cells and dayroom areas.

The comparable areas are 43 square feet per inmate at BHD and 23 square feet at QHD, with 30 inmates double-celled on a tier. Obviously, these figures would be improved if cells were occupied by only one man. The shower facilities at BHD and QHD would meet the A.C.A. standards if there were only one man in a cell, although they fall short now.

The Federal House of Detention on West Street has many cells which are occupied by two men, but the average period of confinement there is much less than at BHD or QHD. Only 30 percent of the inmates at FHD have been there for more than two months, while almost 40 percent of those at BHD have been there more than four months and 75 men have been there more than one year. Defen-

dants pointed out that the United States Bureau of Prisons had examined BHD and qualified it to receive federal prisoners in case of overcrowding at the Federal House of Detention.

A new federal facility with greater capacity is expected to be available before the end of 1974. There was no testimony concerning the possible use of West Street to house New York City prisoners after the building is evacuated by the United States Bureau of Prisons.

Excessive Confinement

Time out of cells is divided into three periods in each institution, spaced in the morning, early afternoon and evening. At BHD, the lockout time is approximately eight and one-half hours, with a few minutes leeway at the end of each period before all inmates return to their cells. At QHD, the lockout time is approximately nine and three-quarters hours. The time is related to the necessities of institutional administration, arranging for court appearances, distributing and gathering food trays, performing tier sanitation, and making head counts. The length of time necessary for such chores depends on the number of men per tier, and the limited number of correction officers.

The inmates at both institutions are fed in their cells, a practice which is not followed at FHD. Wardens of both institutions recognize that there are advantages in feeding inmates in the dayrooms, but consider that this practice is not feasible under present conditions. The dayrooms at BHD and QHD would not accommodate all the inmates of a double-celled section at a time, and feeding would have to be in shifts.

At FHD, inmates are permitted unrestricted movement throughout both housing floors and from floor to floor, from 6:00 a.m. to 10:30 p.m. There is a lower proportion of violent crimes charged against the federal inmates than is true in city institutions. However, sentenced state prisoners in upstate institutions have much greater freedom of movement than the detainees at BHD and QHD.

During the lockout times, the cells in BHD are open, while those in QHD are locked. There are arguments in support of both practices. Locking the cells minimizes thefts, avoids the risk of fights occurring in cells outside the view of correction officers, and improves the security situation. Leaving the cells open increases the space available for inmates, provides greater flexibility of movement during lockout periods, and promotes privacy.

Activities

Both institutions have a variety of facilities available for inmates. One witness, for instance, said that he participates five nights a week in a program of John Jay College; another takes part in an arts and crafts program scheduled by the Brooklyn Museum of Arts. Another sings in the choir, studies English and participates in a dramatic program. There is an inmate newspaper at BHD supported by the administration, without undue censorship. At QHD, there is group counselling by the Ethical Culture Society; outside agencies specializing in drug addiction have access to the institution for inmate counselling, and there is an extensive volunteer clergy program in addition to the regular chaplains employed by the institution. Weekly movies are shown in the auditorium and periodic live plays and concerts are presented by outside community groups.

Other activities include a high school equivalency program, where inmates may attend classes twice a week, instruction in English as a second language, and instruction in legal research. There are a few detainee work programs where they can earn nominal sums in housekeeping tasks.

Other positive aspects of BHD and QHD include closeness to the inmates' homes, a relatively large percentage of black and Puerto Rican correction officers, a policy of not censoring mail, and liberal access to the press.

Some of the programs at both institutions have waiting lists, but this is not true of all. Half of the counseling positions at BHD are vacant.

The gymnasiums at both institutions are small, and available generally only once or twice a week for each inmate. The elevators in both institutions were designed for a period before there was such a variety of activities. Program scheduling difficulties have arisen because of the necessity to reduce elevator tie-ups as well as lack of staff.

Classification

Admittedly, the classification system at both institutions is inadequate. There are limits on the extent of classification that is possible in a detention facility, but again inadequate staff and budget prevent even attaining what is possible. The Wardens recognize that many detainees are not dangerous and do not need maximum security. Plaintiffs' experts testified that only about 20 percent of inmates require maximum security, and this estimate was basically confirmed by Warden Rubin of QHD.

Discussion

Judicial concern with conditions inside correctional institutions is a relatively new development in this genera-

tion. It requires balancing the need for security against the rights of inmates to a humane living environment. *E.g. Inmates of Milwaukee County Jail* v. *Petersen,* 353 F. Supp. 1157 (E.D. Wisc. 1973). Security includes not only preventing escape so as to assure production in court, but preventing harm to inmates from others in custody. It is frequently stated that pretrial detainees should be held under the least restrictive conditions compatible with security. *E.g. Rhem* v. *Malcolm,* 371 F. Supp. 594 (S.D.N.Y. 1974); *Brenneman* v. *Madigan,* 343 F. Supp. 128 (N.D. Calif. 1972); *Hamilton* v. *Love,* 328 F. Supp. 1182 (E.D. Ark. 1971).

The problem is compounded by the fact that budget-makers give a low priority to correctional institutions in both state and federal areas and by the fact that federal courts may function only to protect inmates from deprivation of constitutional rights, not to declare optimum policies for state administration or funding. *Breeden* v. *Jackson,* 457 F.2d 578 (4th Cir. 1972); *Collins* v. *Schoonfield,* 344 F. Supp. 257 (D. Md. 1972).

1. As to the problem of double-celling, there is square authority that there should not be more than one man in a cell. The District Court of Massachusetts enjoined the officials of Suffolk County from housing more than one inmate awaiting trial in a cell, subject to a grace period to comply with the ruling. *Inmates of the Suffolk County Jail* v. *Eisenstadt,* 360 F. Supp. 676 (D. Mass. 1973), *aff'd.* 494 F. Supp. 1196 (1st Cir. 1974). Although the A.C.A. Standards do not have the force of law, they have a persuasive effect within the amorphous boundaries of federal rights.

Defendants cite cases which permit two inmates in a cell and hold that the forbidden limits are reached only

when there are three or more in a cell. *Johnson* v. *Lark,* 365 F. Supp. 289 (E.D. Mo. 1973); *Jones* v. *Wittenberg,* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom. Jones* v. *Metzger,* 456 F.2d 854 (6th Cir. 1972). Given the length of confinement at BHD and QHD, see *Wallace* v. *Kern,* 72-C-898 (E.D.N.Y. March 7, 1974), *rev'd,* —— F.2d —— (2d Cir. July 8, 1974), the court cannot accept double-celling as permissible. It may not be practicable to terminate the practice at once, and there may be a few cases where inmates prefer to have cellmates, but the practice should be eliminated as soon as possible.

Overcrowding is not measured by the percent of capacity as computed by comparing census with total beds, but by the number of individual cells that are over-occupied, whatever may be the reason for keeping other cells and dormitory areas out of use. Lack of funds is not an excuse for denying constitutional rights. *Jones* v. *Wittenberg, supra; Jackson* v. *Bishop,* 404 F.2d 571, 580 (8th Cir. 1968—per Blackmun, J.).

Limiting cells to single occupancy will create problems. It may be necessary to recruit detainees to do the work now done by sentenced prisoners, and this may have to be limited to volunteers. The city may have to spend money to utilize space that is now vacant. It may be necessary to move some inmates to places farther from their homes. Those problems can be held to a minimum with good planning; they do not justify continued adoption of the line of least resistence, which would mean continued double occupancy of cells.

2. As to excessive confinement, the problem arises in part from overcrowding. The inmates presently are out of their cells for periods ranging from eight to ten hours per

day. Additional lockout time can quite likely be provided when double-celling is eliminated. The precise number of hours may be left to the judgment of the wardens and administration. Comparison with state prison conditions has some significance, but is not decisive.

Feeding in the dayrooms would be preferable to feeding in cells. The dayrooms may be adequate to serve as dining facilities when the cells are occupied by only one man. Likewise, the necessity for one inmate to eat on his bed will be eliminated when there is only one inmate to seat at the table. The discomfort or indignity of eating in a cell is not a constitutional violation within the general principles laid down in *Sostre* v. *McGinnis,* 442 F.2d 178 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049, 92 S.Ct. 719, 405 U.S. 978, 92 S.Ct. 1190 (1972). Nor can it be described as cruel and unusual punishment. *Rhem* v. *Malcolm,* 371 F. Supp. 594, 624 (S.D.N.Y. 1974).

Denial of outdoor exercise is a serious violation. *New York State Association* v. *Rockefeller,* 357 F. Supp. 752, 769 (E.D.N.Y. 1973). There is no indication that adequate outdoor exercise can be provided at either institution, considering the lack of yard space and the small area of the roof tops. No practicable form of injunctive relief in this connection has been proposed.

A variety of problems at BHD and QHD are inter-connected with the effects of undue delays in trial of defendants, budgetary restraints respecting staff and equipment, and lack of prescience in the planning and construction of the institutions, and cannot all be corrected in one action. Trial delays are being reduced, according to the evidence recently provided to this court in *Wallace* v. *Kern,* 72-C-898, although less rapidly than might be desired.

It is ORDERED (1) that, counting from September 1, 1974, no person shall be confined in a cell with another person for a period longer than thirty days unless on the voluntary written consent of both persons; (2) that beginning six months after the date of this Memorandum and Order, no person shall be confined in a cell with another person without similar consent, except in the case of an emergency certified by the Commissioner of Correction and the Chairman of the Board of Correction, and then for periods not longer than ten days; (3) that the complaints be dismissed in so far as they seek other relief; and (4) that the operation of this Order be stayed for seven days to permit defendants to determine whether to appeal and apply to the Court of Appeals for a stay pending appeal.

ORRIN G. JUDD
U.S.D.J.

Plaintiffs' Notice of Motion Dated August 12, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

PLEASE TAKE NOTICE that upon the annexed affidavit of JOEL BERGER, Esq., the undersigned will move this Court on the 13th day of September, 1974, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 11 at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to Rules 59 (e) and 60 (a) of the Federal Rules of Civil Procedure amending, and correcting the Judgment entered in the instant case on July 31, 1974 and granting such other, different and further relief as to the Court may seem just and proper.

Dated: New York, New York
August 12, 1974

Yours, etc.,

WILLIAM E. HELLERSTEIN
JOEL BERGER
STEVEN A. HERMAN
MICHAEL B. MUSHLIN
The Legal Aid Society
Prisoners' Rights Projects
15 Park Row
New York, New York 10038
212—374-1737

Plaintiffs' Notice of Motion

To:

Hon. Lewis Orgel, *Clerk*
United States District Court
Brooklyn, New York

Hon. Adrian P. Burke
Corporation Counsel,
City of New York
Municipal Building
New York, New York

Attention: Donald J. Tobias, Esq.
Marian Probst, Esq.

Affidavit of Joel Berger Dated August 12, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOEL BERGER, being first duly sworn, deposes and says:

1. I am Assistant Attorney-in-Charge of the Legal Aid Society Prisoners' Rights Project, and am one of the attorneys for plaintiffs in the above-titled cases.

2. I submit this affidavit in support of plaintiffs' motion pursuant to F.R.C.P. 59(e) and 60(a) to amend and correct paragraphs 2 and 3 of the Judgment entered in the above-titled cases on July 31, 1974.

3. Although the constitutionality of many of the conditions and procedures in the Brooklyn and Queens Houses of Detention were challenged in these cases, the parties, after consulting with the court in conference on February 15, 1973 and October 3, 1973, agreed that two issues common to both suits, overcrowding and excessive lock-in time, would be tried in January 1974. It was agreed that litigation of the remaining issues before the Court, in *Valvano* specifically; (1) disciplinary procedures; (2) visiting hours; (3) correspondence rules, would be held in abeyance pending resolution of those issues in *Rhem* v. *Malcolm,* 70 Civ. 1362 (S.D.N.Y.).

Affidavit of Joel Berger

The remaining issues in *Detainees of the Brooklyn House of Detention* v. *Malcolm* case, not consolidated for trial in January, 1974 were to be tried at a later date. The Court, in its order consolidating *Valvano* with *Detainees of the Brooklyn House of Detention,* noted these arrangements:

> Trial of the remaining issues has been deferred pending consideration of Judge Lasker's determination of similar issues with respect to the Manhattan House of Detention for Men which are before him in *Rhem* v. *Malcolm.** See Memorandum and Order of the court, dated September 5, 1973, p. 2.

4. During January and February of 1974, trial was held before this court and evidence pertaining solely to the issues of overcrowding and excessive lock-in time was presented.

5. In its Memorandum of Decision and Judgment dated July 31, 1974 the court granted plaintiffs relief with re-

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* To date final judgment has been entered in *Rhem* providing: (1) that mail from Courts, attorneys or public officials may not be read by jail officials and this mail may not be opened except in the presence of the detainee; (2) that prior to the imposition of institutional discipline, hearings must be held which afford detainees the right to advanced written notice of the charges, confrontation and cross-examination of witnesses, counsel or counsel substitute in certain circumstances, and a written decision summarizing the evidence supporting the determination. That portion of the final judgment regarding confrontation, cross-examination, and counsel has been stayed pending reconsideration in light of *Wolff* v. *McDonnell,* —— U.S. —— (1974), 42 L.W. 5190 (June 26, 1974). The court also found visiting hours at the Tombs, comparable to those at Brooklyn and Queens, insufficient. A hearing has been held to determine the specific relief to be granted on this question and decision is pending.

spect to overcrowding, but dismissed the complaints as to all other relief sought.

6. Because the provision of the judgment dismissing the complaints may be interpreted as affecting the untried issues in both cases, plaintiffs have brought on this motion for an order amending and correcting the instant judgment to specifically provide that the court's order of dismissal relates only to the issues which were actually tried.

7. Plaintiffs also request that the dismissal of their claim of excessive cell confinement be without prejudice to renewal following defendants' compliance with the court's order regarding overcrowding. The judgment provided that by March 5, 1975 the populations of both the Brooklyn and Queens Houses of Detention will be reduced to one person per cell. As the court noted, the problem of excessive cell confinement arises in part because of overcrowding and the elimination of overcrowding should alleviate some of the excessive cell confinement. When defendants have fully complied with the order regarding overcrowding, the parties and the court will be better able to judge the adequacy of the lock-out hours. Accordingly, the denial of plaintiffs' excessive cell confinement claim ought to be without prejudice to renewal at the proper time.

8. An additional issue, denial of outdoor exercise, was referred to in the court's memorandum of decision and order. Slip Op., p. 18. At trial, testimony regarding the amount of outdoor exercise provided detainees was adduced solely as it related to the amount of time detainees

were allowed out of their cells and not as a separate question for adjudication. For that reason plaintiffs did not offer evidence on the negative psychological or physical effects which can result from denial of outdoor exercise, nor did plaintiffs propose forms of injunctive relief to correct the problem. In *Rhem* v. *Malcolm* such testimony was taken and relief was granted to plaintiffs. Because the recreation issue was not presented for adjudication by the parties,* the dismissal order entered by the court should be clarified as being without prejudice to the adjudication of this question in a subsequent proceeding. In the alternative, if the court deems the issue of outdoor exercise to be within the ambit of this proceeding, then plaintiffs respectfully request that they be given an opportunity to present relevant evidence and to suggest appropriate relief to remedy what the court found to be a "serious violation" of plaintiffs' constitutional rights.

9. Finally, the court's order provides that double-celling will be permitted only when the Commissioner of Correction and the Chairman of the Board of Correction certify that an emergency exists. No provision has been made, however, for plaintiffs' attorneys to be notified and apprised of such situations. For purposes of insuring compliance with the court's order, it is imperative that such a notice provision be included in the order so that plaintiffs may have an opportunity to evaluate independently the need for taking the drastic step of reimposing double-celling.

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* The issue, however, has been pleaded in another case challenging conditions in the Queens House of Detention presently pending before Judge John F. Dooling. *Detainees et al.* v. *Malcolm, et al.*, 73 C 1364.

10. No prior application for the relief requested in this application has been made.

WHEREFORE, it is respectfully requested that this court issue an order amending, altering and correcting paragraphs (2) and (3) of the judgment entered on July 31, 1974 to provide that the complaints are dismissed solely insofar as they relate to the issue of excessive lock-in hours; that the dismissal as to lock-in hours is without prejudice to renewal following defendants' compliance with the court's order regarding overcrowding; that plaintiffs' attorneys be notified in all instances when defendants believe an emergency necessitating double-celling exists; and that this court grant such other relief as it deems just and proper.

[Sworn to by Joel Berger on August 12, 1974.]

Defendants' Notice of Motion Dated August 12, 1974 to Amend Order of July 31, 1974 and for a Stay of That Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

SIRS:

PLEASE TAKE NOTICE that upon the affidavits of Donald J. Tobias, Frank Rundle, M.D. and Benjamin J. Malcolm, a motion will be made at the United States District Courthouse for the Eastern District of New York located at 225 Cadman Plaza, Brooklyn, New York, on the 13 day of September, 1974, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure amending the order of this Court, dated July 31, 1974, and for an order, pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, staying the implementation of the order of this Court, dated July 31, 1974, pending disposition of this motion, and for other related relief as the Court may deem just and proper.

Yours, etc.

ADRIAN P. BURKE
Corporation Counsel
Attorney for City Defendants
Municipal Building
New York, New York 10007

By DONALD J. TOBIAS

To:

LEGAL AID SOCIETY
PRISONERS' RIGHTS PROJECT
Attorney for Plaintiffs
15 Park Row
New York, New York

Affidavit of Donald J. Tobias Dated August 12, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DONALD J. TOBIAS, being duly sworn, deposes and says that:

1. He is an assistant in the office of Adrian P. Burke, Corporation Counsel of the City of New York. Deponent submits this affidavit in support of the motion, made pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to amend the order of this Court, dated July 31, 1974, and in support of the motion, pursuant to Rule 62(b), to stay the implementation of the order pending the disposition of this motion.

2. Said order, promulgated after an extensive trial, requires the City to implement a program eliminating double cell occupancy at the Brooklyn and Queens Houses of Detention according to a timetable set down by the Court.

3. Said order however, fails to take into account several factors not raised at trial by either side. While testimony was introduced concerning the relative merits of double cell occupancy, little was said about the necessity for its utilization in special cases, such as for inmates under mental observation, for those showing apparent signs of

depression, or for those undergoing methadone detoxification.

4. As stated in the affidavits of Dr. Rundle and Commissioner Malcolm, correctional officials have utilized double cell occupancy for reasons other than to relieve institutional overcrowding. The Department of Correction, which is by law mandated to exercise control and custody over detainees, is often required to make housing assignments based on relatively little substantive background information. Thus, as in the affidavit of Dr. Rundle, the placing of two men in one cell is at times deemed to be medically desirable.

5. In addition, the order of this Court sets forth a two-stage timetable calling for elimination of double celling, in two stages. It is submitted that the timetable, as set forth in the order, fails to take into account the many problems faced by this Department, as set forth in the affidavit of Commissioner Malcolm.

WHEREFORE, the defendants respectfully request that this Court amend its order, dated July 31, 1974, and permit the defendants to utilize double cell occupancy for those inmates under mental observation, or participating in the methadone detoxification program. The defendants also request that the Court allow the defendants to utilize double celling during periods when cells are under repair, and amend the timetable set forth in the order upon an assessment of the Department's housing capabilities.

[Sworn to by Donald J. Tobias on August 12, 1974]

Affidavit of Dr. Frank Rundle Dated August 12, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

FRANK RUNDLE, M.D., being duly sworn, deposes and says that:

1. He is Director of Psychiatry, Prison Health Services, of the New York City Department of Health. Deponent submits this affidavit in support of the motion to amend the order of the Court, dated July 31, 1974.

2. The order of this Court, which contemplates that the defendants will not be permitted to house more than two inmates in a single cell, fails to take into account the problem created by the inmate who the Prison Health Services personnel determines to be in need of special observation. In such instances, in order to prevent suicides, such an inmate is at times placed in a cell with another inmate. The individual in whose cell the "observation" inmate is placed plays a significant role in preventing suicides.

3. Said individual is alerted and urged to intervene and call for help in the event that the inmate under observation attempts suicide.

Affidavit of Dr. Frank Rundle

4. It is submitted that the ability of the defendants to place, on a selective basis, inmates in need of observation in cells with another inmate is a crucial component of institutional safety. Moreover, the ability to place an inmate under observation in a cell with another individual enables the inmate under observation to form a positive relationship with his cellmate, with a resultant positive effect on his attitude and behavior while incarcerated.

5. It is therefore urged that this Court amend its order and allow, for protective purposes, the placement of an inmate under mental observation in a cell with another inmate.

[Sworn to by Frank Rundle on August 12, 1974]

Affidavit of Benjamin J. Malcolm, Commissioner of Department of Corrections Dated August 12, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

BENJAMIN J. MALCOLM, being duly sworn, deposes and says that

1. He is Commissioner of the New York City Department of Corrections and submits this affidavit in support of the motion to amend the order of this Court, dated July 31, 1974.

2. As stated in the affidavit of Dr. Frank Rundle, Director of Psychiatry, Prison Health Services, the order of this Court enjoining the practice of double cell occupancy at the Queens and Brooklyn Houses of Detention, does not allow the Department to take the maximum precautionary steps to protect the safety of inmates deemed to be potentially suicidal.

3. In addition, it has been the policy of this department to utilize double celling for other medically related purposes, specifically for methadone detoxification cases. The Department's methadone detoxification program was instituted by the department on March 27, 1971, following a rash of addiction related suicides. The program involves

a 7-10 day detoxification treatment, with inmates in doubly occupied cells. Said program has resulted in the detoxification of approximately 80,000 inmates and has received nationwide recognition.

4. The proper implementation of the methadone detoxification program requires that this department be permitted to house two inmates in a single cell. Moreover, in order to protect certain individuals who are deemed to be potentially suicidal, the institution should not be enjoined from placing him in a cell with another inmate. (See the affidavit of Dr. Rundle.)

5. Thus, the Department is compelled to request that this Court recognize the Department's need to have a degree of flexibility in making housing assignments. For instance, aside from the considerations referred to above (where double cell occupancy is medically advisable) the department must be able to utilize double cell occupancy during periods when cells are being repaired.

6. The Court, in its decision recognized that it may not be practicable to terminate the practice of double celling at once. Nevertheless, the Court has set a relatively short time for the implementation of single cell occupancy. It should be noted however, that the Department has presently made rapid strides in reducing double cell occupancy at all institutions under its control. Nevertheless, the Department is presently faced with several federal decisions which will effect the overall use of departmental facilities. The order of the Court in *Rhem* v. *Malcolm* has required the Department to close the Manhattan House of Detention. In the event that the Department is not successful in ob-

taining a stay of this order, the population (416 inmates) of that institution will have to be shifted to housing tiers on Rikers Island that are presently being refurnished, as well as to the Ossining Correctional Institution.

7. The *Rhem* order then has severely strained the housing capabilities of this Department. And, the Department is being urged by the Board of Corrections to return some 600 inmates under the Department's custody, who are presently housed at Ossining, to City institutions.

8. Similarly, the Court should take note of the fact that several lawsuits have ordered the Department to expand its efforts in the area of inmate classification. It must be recognized, however, that proper inmate classification can cause underutilization of cell space by as much as 25%.

9. It is clear then, that any order requiring two major institutions to restrict the number of inmates admitted has ramifications for other institutions. Consequently, the defendants submit that before such an order and timetable is issued, the Court must examine the Citywide correctional picture in order to have an understanding of the Department's capabilities.

10. It is therefore requested that the order be amended to allow the defendants the flexibility needed to adequately protect suicidal inmates and to administer its highly successful methadone detoxification program. Moreover, the order should be amended to allow the Department greater flexibility to deal with such factors as the need to repair broken cells. Finally, it is requested that the order should

be amended to take into account all factors as hereinbefore described, including the Department's present capabilities.

11. The order of this Court, dated July 31, 1974, requires partial implementation by September 1, 1974. As stated above, implementation will not only cause a major shifting of population within institutions under departmental control, but it is also anticipated that the single cell ruling, if implemented at BHD and QHD will overcrowd other City institutions. It is therefore requested that this Court stay its present order pending consideration of the factors raised in this motion.

WHEREFORE, the motion to amend the order dated July 31, 1974 should be granted and the implementation of the July 31, 1974 order should be stayed pending disposition of this motion.

[Sworn to by Benjamin J. Malcolm]

Defendants' Notice of Motion Dated August 16, 1974 for a Stay of Order of July 31, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Marian Probst and the Notice of Motion filed with the Court on August 12, 1974 and the affidavits annexed thereto, a motion will be made at the United States District Courthouse for the Eastern District of New York, located at 225 Cadman Plaza, Brooklyn, New York on the 23rd day of August, 1974 at 10:00 in the forenoon or as soon thereafter as counsel may be heard for an order pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, staying the implementation of the order of this Court, dated July 31, 1974 pending the hearing of the motion, filed on August 12, 1974 and returnable before Hon. Orin G. Judd on September 13, 1974, and for such other and related relief as to this Court may deem just and proper.

Yours, etc.,

ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007

By: MARIAN PROBST

To:

LEGAL AID SOCIETY
Prisoners' Right Project
15 Park Row
New York, New York

Affidavit of Marian Probst Dated August 16, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MARIAN PROBST, being duly sworn, deposes and says that:

1. She is an Assistant in the office of Adrian P. Burke, Corporation Counsel of the City of New York, attorney for defendants.

2. Deponent submits this affidavit in support of the motion made pursuant to Rule 62(b) of the Federal Rules of Civil Procedure for an order staying the implementation of the order of the Court, dated July 31, 1974, pending the hearing of the motion, filed by defendants on August 12, 1974, for an order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, amending the order of the Court and for an order pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, staying the implementation of the order of the Court pending the determination of the motion.

3. The necessity for the relief requested herein has been occasioned by the unavailability of Judge Judd, who promulgated the order, to hear the motion prior to September 13, 1974 when the motion is returnable.

Affidavit of Marian Probst

4. Defendants have contended that the order as promulgated fails to take into account several factors not raised at trial nor anticipated by either side.

5. As these factors cannot be considered until the hearing of the motion, and whereas the order of the Court requires partial implementation by September 1, 1974, this motion has been made returnable before Judge Neaher.

6. As stated in the Affidavit of Donald J. Tobias, submitted in support of the motion returnable on September 13, 1974, the order of this Court, promulgated after an extensive trial, requires the city to implement a program eliminating double cell occupancy at the Brooklyn and Queens House of Detention, according to a timetable set down by the Court.

7. These factors, which defendants allege in support of the motion, and as further stated in the Affidavits of Dr. Rundle and Commissioner Malcolm, annexed thereto, consist of the desirable practice of double celling for inmates under mental observation, in a methadone detoxification program or those showing apparent signs of depression.

8. Moreover, this motion must include consideration of significant recent developments in the correctional area that necessarily affects the inmate population at the Brooklyn and Queens House of Detention. These developments are the recent decision by the Second Circuit, Court of Appeals, to allow inmates at the Manhattan House of Detention to be transferred to Rikers Island Institution after spending fourteen (14) days in the Manhattan House of

Detention. Also the proposed transfer of 600 inmates from Ossining to city institutions thus further creates inmate housing population problems.

9. Clearly, partial implementation of the order by September 1, 1974 would cause chaos and disruption to the correctional program presently in progress and possible hardship to all parties concerned.

10. Defendants fully expect that upon the factors adduced at the hearing and determination of the motion, the relief requested will be granted in all respects.

WHEREFORE, the city defendants respectfully request that this Court grant a stay of the implementation of the order of the Court, pending the hearing of the motion returnable on September 13, 1974.

[Sworn to by Marian Probst on August 16, 1974]

Affidavit of Steven A. Herman Dated August 22, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STEVEN A. HERMAN, being duly sworn deposes and says:

1. I am an attorney with the Legal Aid Society Prisoners' Rights Project, counsel for the plaintiffs in the above-captioned actions.

2. I submit this affidavit in opposition to defendants' motion for an order staying the implementation of the court's order of July 31, 1974 pending the hearing on September 13, 1974, of defendants' motion to amend under Rule 59(e) of the Federal Rules of Civil Procedure.*

3. Defendants allege that partial implementation of the July 31 order is required by September 1, 1974. They argue that the instant motion is necessitated by the fact that Judge Judd will not be able to hear their motion to stay the aforementioned July 31 order pending consideration of their motion to amend until September 13. (Affidavit of Marion Probst, ¶5).

4. Contrary to defendants' assertions, the Court's order of July 31, 1974, will not require any action on the part of defendants until well after the September 13, 1974 hearing date before Judge Judd.

* A copy of the order is attached hereto.

Affidavit of Steven A. Herman

5. The order of July 31, 1974 provides in its first subparagraph that "counting from September 1, 1974, no person shall be confined in a cell with another person for a period longer than thirty days, unless on the voluntary written consent of both persons" (emphasis added). Thus, notwithstanding the mention of September 1, 1974, the order does not enjoin the defendants from confining two persons in a cell or require the defendants to obtain written consent if they wish to continue to confine two persons in a cell until September 30, 1974, 17 days after defendants' motion for a stay will be heard by Judge Judd.

6. Subparagraph (2) of the order does not effect defendants' power to confine two persons in a cell until six months after July 31, 1974.

7. In sum, all of the questions which defendants raise in their motion can be heard and resolved in orderly and timely fashion by Judge Judd without defendants being prejudiced in any way.

WHEREFORE defendants motion for a stay pending the hearing on September 13, 1974 should be denied.

Dated: New York, New York
August 22, 1974.

[Sworn to by Steven A. Herman on August 22, 1974]

Affidavit of Joel Berger Dated September 19, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOEL BERGER, being first duly sworn deposes and says:

1. I am Assistant Attorney-in-Charge of the Legal Aid Society Prisoners' Rights Project, and am one of the attorneys for plaintiffs in the above-entitled cases.

2. I submit this affidavit in opposition to defendants' motion to amend the judgment of the court entered in the above-titled cases on July 31, 1974 and to stay the full implementation of the order pending disposition of this motion.

3. Following an extensive trial in January and February of 1974, the court, in its opinion and order entered on July 31, 1974, found that double-celling of detainees was unconstitutional and ordered defendants to eliminate the practice pursuant to the following two step schedule:

a. Counting from September 1, 1974, no person can be confined in a cell with another person for longer than thirty days without voluntary written consent of both persons.

b. Effective February 1, 1975, no person may be double-celled at all without his written consent, except

that in an emergency double-celling may be allowed for a period not to exceed 10 days.

4. Defendants have moved the court to alter its judgment so as to permit involuntary double-celling of detainees who are undergoing mental observation or methadone detoxification. In addition defendants seek permission to double-cell when they are repairing broken cells. Finally, alleging that the court has failed "to take into account the many problems faced by this department" (Affidavit of Donald J. Tobias, ¶5), defendants request revision of the court's timetable for the elimination of double-celling and further request a stay pending the court's consideration of their motion.

5. Defendants' allegation that the court failed to take into account situations necessitating double cell occupancy is totally without merit. At the trial of these actions, consuming over six court days, and in the extensive memorandum submitted by defendants, the City had every opportunity to present any legal and factual justification for double cell occupancy. In fact, as this Court noted in its opinion, defendants were not able to produce a single witness to testify that double occupancy of the tiny 8′ by 5′ cells at Brooklyn and Queens was desirable. (Slip op. p. 8). Defendants' effort to produce such evidence at this stage, following judgment, can only be characterized as an attempt to relitigate issues already decided adversely to them.

6. Moreover, defendants' objections have no basis in fact. As to the question of mental observation and methadone detoxification cases, the court's judgment enjoins

double occupancy only as practiced in the current tiny 8′ x 5′ cells. Defendants have the capability to create double-size cells by breaking down partitions between cells, and in fact have voluntarily agreed to do so in the Tombs whenever doubling is needed for "administrative or medical reasons." *Rhem* v. *Malcolm*, 70 Civ. 3962 (S.D.N.Y.), (Consent Decree of August 2, 1973, ¶1C). Thus, there is nothing to prevent defendants from double-celling in the few cases where it may be legitimately necessary, so long as they provide adequate living space for each detainee, as they have already agreed to do in *Rhem*. Defendants' effort to continue to cram two detainees into tiny cells adequate for only one, under the guise that mental or physical needs require such treatment, merely continues their policy of adopting "the line of least resistance which would mean continued double occupancy of cells." (Slip op. p. 17). Defendants' argument is even more specious when one considers that an entire dormitory and over one hundred and thirty cells are currently vacant at the two institutions. (Slip op. p. 5).

7. Similarly the court's judgment adequately protects defendants whenever genuine emergency conditions exist by permitting double celling in such instances for up to ten (10) days. (Slip op. p. 19). Accordingly, it is totally unnecessary to change the Court's order to provide for double-celling when repairs to cells are required.

8. Finally defendants seek modification of the court's timetable for establishing single cell occupancy. However, they do not propose any alternative timetable, and instead seem to be seeking an indefinite postponement of the court's ruling. The court has provided defendants with ample time

in the carefully formulated two-step, six month plan set forth in the opinion, and defendants have offered no reason why that remedy should not be adhered to.

9. Defendants allege that "implementation will not only cause a major shifting of population within institutions under departmental control, but it is also anticipated that the single cell ruling, if implemented at BHD and QHD will overcrowd other City institutions." (Affidavit of Benjamin J. Malcolm, ¶11). This statement constitutes a veiled threat that defendants, if required to obey the court's order, will merely double-cell the current detainees of BHD and QHD at other institutions (e.g., on Rikers Island) rather than engage in careful planning to utilize vacant space and find other facilities, as the court urged in its opinion (slip op. p. 17). Such action by defendants would frustrate the very purpose of the order, and surely would not be countenanced by the court. As the court has noted, "[l]ack of funds is not an excuse for denying constitutional rights" (Slip op. pp. 16-17). The court has provided defendants with ample opportunity to obtain whatever funds are needed and engage in whatever planning is necessary to end the unconstitutional practice of cramming two unconvicted citizens into tiny 8′ x 5′ cells. Defendants should not be allowed to evade their constitutional responsibilities, but should rather be required to begin preparing for compliance forthwith.

WHEREFORE it is respectfully requested that defendants' motion be denied in all respects.

[Sworn to by Joel Berger on September 19, 1974]

Affidavit of Donald J. Tobias in Opposition to Plaintiffs' Motion to Amend and Correct District Court Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DONALD J. TOBIAS, being duly sworn, deposes and says that:

1. He is an Assistant in the office of Adrian P. Burke, Corporation Counsel of the City of New York. Deponent submits this affidavit in opposition to the plaintiffs motion to amend and correct the judgment of this Court.

2. The plaintiffs have moved for an order providing that this courts' dismissal of the issue of alleged "excessive confinement" should be without prejudice to renewal following compliance with the Courts order regarding overcrowding.

3. It is clear however, that said proposal is inappropriate and varies sharply with the findings and conclusions of this Court.

4. The plaintiffs in commencing this lawsuit, have contended, and attempted to prove at the trial, taking place in January and February, 1974, that certain conditions at the Brooklyn and Queens Houses of Detention are uncon-

stitutionally oppressive. The defendants attempted to prove that the conditions at the institutions, with respect to the issues under examination, were not unconstitutionally burdensome and that this being the case, the Federal Courts are as a matter of law, without authority to exercise control over the daily operation of City detention facilities.

5. With respect to the issue of overcrowding, this Court found the true measure of such alleged overcrowding to be the number of inmates who were forced, due to overpopulation, to share cells with other inmates. The Court found this feature of institutional life to be impermissibly restrictive and issued a corrective order.

6. With respect to alleged "excessive confinement" however, the Court did not find the number of lock out hours presently afforded inmates to be unlawfully restrictive. The Court, in arriving at such a conclusion, considered factors of institutional administration, such as the time spent for arranging for court appearances, distributing food, performing the sanitation and head counts. The Court, while speculating that reduced population might enable the defendants to provide longer lockout periods, significantly stated that "the precise number of hours may be left to the judgment of the wardens and administration."

7. Moreover, the plaintiffs, in attempting to show that the lockout schedule, as presently structured in both institutions, is unconstitutionally burdensome, placed a substantial emphasis on their contention that the lockout schedules could be expanded if inmates were fed in the dayrooms. In response to such a contention, this Court noted that the

"discomfort or indignity of eating in a cell is not a constitutional violation within the general principles laid down in *Sostre* v. *McGinnis,* 442 F 2nd 178 . . . Nor can't be described as cruel and unusual punishment. Rhem v. Malcolm, 371 F Supp. 594, 624 (SDNY 1974."

8. It is submitted then, that this Court has clearly ruled that the lockout schedule and confinement practices at both the BHD and QHD are not unconstitutional. And, while it may be possible, at future and undetermined dates, to offer additional lockout time, it has been established that the present schedule and practices comply with minimum constitutional requisites. This being the case, this Court has clearly recognized that further changes in this direction are within the discretion of the defendant administrators.

9. Plaintiffs, in their moving papers, submitted in support of their motion to amend the judgment, have also urged that several issues pertaining to conditions at BHD and QHD remain to be tried, to wit: (1) disciplinary procedures, (2) visiting hours (3) correspondence rules, and that the Courts order of dismissal should be clarified to provide that said dismissal relates only to those issues which were actually tried.

10. While the trial before this Court did not address itself to the above issues, it should be noted that in early February, 1974, the defendants were served with a summons and complaint, encaptioned *Detainees of the Queens House of Detention* v. *Malcolm Men,* 73 C 1364 in which six

named plaintiffs, purportedly acting individually and on behalf of all persons similarly situated, and all represented by the New York City Legal Aid Society, contest the totality of the conditions of incarceration at the Queens House of Detention for Men. Said lawsuit presently before Hon. Judge Dooling, raises many of the issues resolved by this Court, as well as issues that the plaintiffs seek to preserve by way of this motion. For instance, the *Queens Detainee* case raises, among other things, the issue of visitation rights at QHD, an issue plaintiffs herein apparently wish to raise before this Court as well.

11. It is submitted that the plaintiffs should not be permitted to raise the same issues before several Courts, and it is further submitted that the plaintiffs should be required to raise all issues growing out of a common set of facts, in this case their conditions of confinement, in a singular lawsuit. Thus, this Court should deny plaintiffs' request to preserve issues presently being litigated before other Courts.

12. Plaintiffs, in addition, have requested that the order of this Court dismissing the complaint be clarified as being without prejudice to the adjudication of the issue of alleged unlawful denial of outdoor exercise. It should be noted that limited testimony was introduced by each side on such an issue only as it related to the amount of time the detainees were allowed out of their cells. The defendants then, in offering evidence of the indoor and outdoor recreational programs at QHD and BHD did so only to demonstrate the movement within the institutions. Since

neither side believed that the recreational picture per se, at both institutions, was under scrutiny at the January-February, 1974 trial, no expert opinion evaluating BHD and QHD recreational programs was introduced by either the plaintiffs or defendants. Thus, should this Court grant plaintiffs' motion, and permit further evidence pertaining to recreation to be introduced, or preserved for adjudication in a subsequent proceeding, it is submitted that the Court should delete from its conclusion of law language indicating that the outdoor recreational facilities are in any way violative of the plaintiffs' constitutional rights.

13. This Court's findings and conclusions on "outdoor recreation" works a particular prejudice to the defendants. For, in the event that the plaintiffs are permitted to fully litigate this issue, either before this Court, or before Judge Dooling, the defendants are confronted with an adverse finding by this Court resulting from a trial in which neither side believed "outdoor recreation" was directly in issue, and in which neither side, for that reason, presented its complete evidence on "outdoor recreation".

14. Finally, the plaintiffs' request that the order of the Court be amended to provide that plaintiffs' attorneys be notified in the event that the Board of Corrections and the Department of Corrections certify the existence of an emergency of such a nature to require the utilization of double cell occupancy. It is submitted that said request changes the entire scope of the Court's order, and in effect places an affirmative burden on the named official bodies to satisfy the plaintiffs' attorneys of the existence of an emergency situation. Said request contemplates and in fact

would sanction an adverserial proceeding upon the exercise of the discretionary power afforded by the order of this Court.

WHEREFORE, plaintiffs' motions to amend the order to enable them to relitigate the issue of excessive confinement, and to provide for notification to plaintiffs' attorneys upon the declaration of an emergency warranting the utilization of double cell occupancy should be denied, in all respects. Plaintiffs' motions to amend the judgment to provide that the Court's dismissal order be without prejudice to certain issues, to wit, (1) disciplinary procedures (2) visiting hours (3) correspondence rules, should be denied to the extent that said issues are raised in other actions concerning the BHD and QHD. Plaintiffs' motion, requesting that this Court amend its judgment to preserve the issue of alleged unlawful denial of outdoor recreation should not be granted without a corresponding deletion from this Court's conclusions of law language indicating that the outdoor recreational facilities are in any way violative of the plaintiff's constitutional rights.

Letter of September 16, 1974 From Orin Lehman, Chairman of the Board of Correction, to Judge Judd

ORIN LEHMAN, *Chairman*
Barry H. Gottehrer
J. Kenneth Jackson
Wilbert Kirby
Rev. Louis J. Rios
David A. Schulte, Jr.
Rose M. Singer
Peter F. Tufo
Rev. Mannie Lee Wilson

John M. Brickman
Executive Director

BOARD OF CORRECTION
CITY OF NEW YORK
51 CHAMBERS STREET
NEW YORK, N.Y. 10007
212 964-6307
212 566-3856

September 16, 1974

Hon. Orrin G. Judd
Judge
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Judd:

We have recently had called to our attention your memorandum of decision and order of July 31, 1974 in Valvano v. Malcolm and Detainees of the Brooklyn House of Detention v. Malcolm. I am sure that you will understand that we read with particular interest the second numbered provision of your ordering paragraph, relating to emergency certifications for housing of more than one inmate in a cell.

The Board of Correction is deeply committed to the general concept that no more than one inmate should be housed in a cell in the New York City Department of Correction, with certain limited exceptions as may be medically or socially necessary. Indeed, we had occasion to reaffirm that belief as recently as last month, in our report on the future of the Manhattan House of Detention, a copy of which is enclosed for your information. However, we believe that the procedure contained in your order of July 31, 1974 regarding such exceptions may raise certain unforseen problems.

If you do not believe that it would be inappropriate, we would be deeply grateful for the opportunity to meet with you at your convenience, in order to discuss our reactions to your order regarding such certifications, together with other possibilities for achieving what we agree is a most just result.

We look forward to hearing from you.

Respectfully,

Orin Lehman

OL/ba
cc: Hon. Benjamin J. Malcolm

Affidavit of John M. Brickman, Executive Director of Board of Correction Dated September 25, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN M. BRICKMAN, being duly sworn, deposes and says:

1. I am an attorney, admitted to practice before the courts of the State of New York, and serve as the Executive Director of the Board of Correction of the City of New York, an agency of the New York City government established pursuant to Section 626 of the New York City Charter.

2. Although the Board of Correction is not a named party to these actions, it is interested in the outcome thereof, both by virtue of its broad responsibility over the New York City prison system as mandated by the City Charter, and because the order of the Court herein dated July 31, 1974 provides for the involvement of the Chairman of the Board under certain circumstances.

3. Since there is an inconsistency of position between the Department of Correction and the Board of Correction, in that the Board of Correction has taken and continues to maintain a position contrary to that urged by

the Department of Correction regarding the timetable in the Court's order, I have sought and received permission from the First Assistant Corporation Counsel of the City of New York for the Board of Correction to be represented independently. I therefore serve as counsel to the Board of Correction for this action.

4. The order of the Court dated July 31, 1974 requires that beginning six months thereafter, "no person shall be confined in a cell with another person without similar consent, except in the case of an emergency certified by the Commissioner of Correction and the Chairman of the Board of Correction, and then for periods not longer than ten days;". I believe that the requirement that such emergencies be certified by the Chairman of the Board of Correction should not be continued, for the reasons set forth below.

5. A requirement that no more than one inmate be housed in a cell anywhere in the New York City Department of Correction, except under circumstances involving medical or social necessity, has previously been urged by the Board of Correction. See N.Y.C. Board of Correction, Report on the Future of the Manhattan House of Detention 41, August 6, 1974. In my judgment, however, the circumstances under which such double housing may properly be carried out should not require certification in individual cases by the Chairman of the Board of Correction.

6. The Chairman of the Board of Correction, unlike the Commissioner of Correction, is not a full-time employee of the City of New York. Rather, he serves without com-

pensation, essentially as a volunteer, and devotes but a small percentage of his working time to official business. The Chairman of the Board of Correction does not maintain a full-time office for the pursuit of his official duties, although the staff of the Board of Correction does maintain such offices. Therefore, the Chairman may not always be available in cases of emergency when his certification might be needed. Even if the Chairman were available in such emergencies, his knowledge of individual inmates' cases and the necessity of their being housed more than one to a cell would only be secondhand, based upon reports of officials of the defendant Department of Correction, and he would be basing his decisions regarding certification on hearsay information. Furthermore, although the incumbent Chairman of the Board is expert in matters regarding corrections and penology and does have an opinion generally as to which categories of inmates should properly be housed more than one to a cell, he is not a medical doctor or an attorney, and has no particular competence to determine in individual cases whether double celling is required. Finally, the power of certification conferred upon the Chairman by the order is beyond the oversight and recommendatory powers, duties and responsibilities of the Board of Correction as set forth in Section 626 of the City Charter (a copy of which is attached hereto as Exhibit A), and is therefore *ultra vires* the Chairman's authority.

7. In my judgment, the end sought to be achieved by the Court's order of July 31, 1974 can be assured through other means. It might well be appropriate to denote certain categories of inmates who would be eligible for double

celling, such as methadone detoxification patients, suicide risks, and in certain cases those who do not speak English and who therefore require housing with fellow inmates who can as as translators. The decision as to which of such inmates should thus be housed more than one to a cell might well be left with personnel at the institutional level who would be more familiar with the facts regarding individual inmates and their needs. In cases of methadone detoxification, an institutional physician might be the appropriate staff member; in suicide risks, the institutional psychiatrist should be appropriate; in non-English speaking cases, a social services officer of the institution could well be appropriate. At the same time, since the Board of Correction receives Unusual Occurrence Reports from the Department as a matter of cause, we would expect to be notified of double celling on a routine basis.

WHEREFORE, the Board of Correction of the City of New York respectfully requests that the order of the Court of July 31, 1974 be amended to remove the provision that the Chairman of the Board of Correction certify cases in which inmates may properly be housed more than one to a cell, and that some other scheme of approving such housing be derived.

[Sworn to by John M. Brickman on September 25, 1974]

EXHIBIT A ANNEXED TO AFFIDAVIT OF JOHN M. BRICKMAN

NEW YORK CITY CHARTER

DEPARTMENT OF CORRECTION

Sec. 626. Board of Correction.—a. There shall be a city board of correction to consist of nine members to be appointed by the mayor, each for a term of six years, commencing at the expiration of the terms of the present incumbents. Vacancies occurring in such board, otherwise than by expiration of term, shall be filled for the unexpired term. Members of the board shall serve without compensation but may be reimbursed for expenses incurred in the performance of their duties. The chairman of the board shall be designated from time to time by the mayor from among its members. Members of the board may be removed by the mayor for cause and after a hearing at which they shall be entitled to representation by counsel.

The board shall adopt rules to govern its own proceedings. The secretary of the department shall act as secretary of the board and shall keep a record of its proceedings. The commissioner shall designate such of the department's stenographic clerical and other assistance to the board as may be necessary for the proper performance of its functions. The commissioner may attend meetings of the board but shall not be a member thereof.

b. The board shall have the following powers and duties:

1. The inspection and visitation of all institutions and facilities under the jurisdiction of the department.

Exhibit A

2. The inspection of all books, records, documents, and papers of the department.

3. The preparation for submission to the mayor and the commissioner of

(a) proposals for long-range capital planning

(b) studies and reports concerned with the development of the department's correctional program planning

(c) studies and reports in regard to methods of promoting closer cooperation of custodial, probation and parole agencies of government.

4. The evaluation of departmental performance.

c. The board shall annually and at such other times as it may determine, submit to the mayor and the commissioner reports, findings and recommendations in regard to the matters within its jurisdiction. (As added by L. L. 1957, No. 25, June 5.)

Reply Affidavit of Joel Berger
Dated September 25, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOEL BERGER, being first duly sworn, deposes and says:

1. I am Assistant Attorney-in-Charge of the Legal Aid Society Prisoners' Rights Project and am one of the attorneys for plaintiffs in the above-titled cases.

2. I submit this affidavit in response to the affidavit of Donald J. Tobias, opposing plaintiffs' motion to amend the order entered in the above-titled cases on July 31, 1974.

3. In Paragraph 3 of my previous affidavit in support of plaintiffs' motion, verified August 12, 1974, I noted that the issues of visiting hours, correspondence rules and disciplinary procedures in *Valvano* were not tried but rather were held in abeyance pending adjudication of identical issues in *Rhem* v. *Malcolm,* 70 Civ. 3962 (S.D.N.Y.). I requested that this Court's order dismissing the *Valvano* complaint insofar as it seeks other relief be amended so as not to include these issues.

4. Mr. Tobias' affidavit, ¶10, concedes that these issues have not been tried, but nonetheless opposes the relief

requested by claiming that plaintiffs have subsequently raised the same issues in a new suit pending before Judge Dooling, *Detainees of the Queens House of Detention for Men* v. *Malcolm* (73 C 1364).

5. Defendants are mistaken in their allegation that the complaint before Judge Dooling raises issues pending in *Valvano*. At numerous pre-trial conferences in *Valvano*, held on May 19, 1972, June 14, 1972, February 15, 1973 and October 3, 1973, this Court carefully refined the issues remaining in that case and advised plaintiffs that any additional issues concerning the Queens House of Detention must be raised by means of a new lawsuit rather than by any further amendment of the *Valvano* complaint. The Court determined that the issues of correspondence rules and disciplinary procedures were already raised in *Valvano*. As to visiting, the Court determined that the issue of visiting hours was already raised in *Valvano* but that the issue of contact visits was not.

6. Following the Court's directive, plaintiffs filed a new lawsuit raising several issues which the Court had found to be outside the scope of *Valvano*. This case, *Detainees of the Queens House of Detention* v. *Malcolm*, (73 C 1364) is presently pending before Judge Dooling. The complaint, a copy of which is annexed hereto, does not even mention disciplinary procedures or correspondence rules. Visiting hours are mentioned once, but merely as background in a section on visiting facilities (¶'s 22-27), and relief is requested only with regard to visiting facilities (Prayer for Relief, ¶IV C).

[Sworn to by Joel Berger on September 25, 1974]

District Court Judgment Dated October 2, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

These actions came on to be tried before the Court, Honorable Orrin G. Judd, District Judge, presiding, and the Court having made and filed findings of fact and conclusions of law in a Memorandum of Decision and Order dated July 31, 1974, and plaintiffs and defendants having moved pursuant to F.R.Civ.P. 59(c) and 60(a) for an order amending the order entered on July 31, 1974, and the Court having heard both sides in opposition and in support of said motions, and the Court having read and considered all papers filed in connection with said motions, and upon all the proceedings had herein the Court determining that there is no just reason for delay in the entry of judgment herein, it is hereby

ORDERED, ADJUDGED AND DECREED that the order entered on July 31, 1974 be, and hereby is, vacated and the following judgment is substituted in place thereof; and it is further

ORDERED, ADJUDGED AND DECREED that counting from September 1, 1974 no person shall be confined to a cell with another person for a period longer than thirty days unless on the voluntary written consent of both persons; and it is further

District Court Judgment

ORDERED, ADJUDGED AND DECREED that beginning March 1, 1975 no person shall be confined in a cell with another person without the voluntary written consent of both persons; provided, however, that involuntary confinement with another person shall be permitted in the following instances:

(a) In the case of a person duly enrolled in a methadone detoxification program, for a period not to exceed ten days.

(b) In the case of a person in need of mental observation due to depression and/or potential suicidal tendencies certified in writing by a staff psychiatrist, for a period not to exceed thirty days; provided, however, that such persons may be confined for longer periods if cells containing at least twice the floor space of the present cells are utilized.

(c) In the cases of emergencies certified by the Commissioner of Correction which necessitate making cell repairs, for a period not to exceed thirty days; provided, however, that all cell repairs shall be performed as quickly as possible.

(d) In the case of all other emergencies certified by the Commissioner of Correction, for a period not to exceed ten days.

(e) Defendants shall maintain a written record of all instances wherein more than one person is confined to a cell. The record shall disclose the name and cell location of the person so confined, the date of confinement, the reason for confinement and the date when such confinement ceased. The record shall be

made available monthly for inspection and copying by plaintiffs' attorneys; and it is further

ORDERED, ADJUDGED AND DECREED that the complaint in *Ralph Valvano, et al.* v. *Benjamin Malcolm, et al.,* be, and hereby is, dismissed insofar as it seeks relief other than that granted herein with respect to those issues actually tried before the Court; provided, however, that the complaint is not dismissed with regard to the issues of disciplinary procedures and correspondence rules; and further provided, however, that this order of dismissal is without prejudice to plaintiffs raising the issues of visiting hours and recreation in another action, and it is further

ORDERED, ADJUDGED AND DECREED that the complaint in *Detainees of the Brooklyn House of Detention, et al.* v. *Benjamin Malcolm, et al.,* be and hereby is, dismissed insofar as it seeks relief other than that granted herein with respect to those issues actually tried before the court; provided, however, that the complaint is not dismissed with regard to those issues as yet untried; and it is further,

ORDERED, ADJUDGED AND DECREED that the operation of this order be stayed for seven days to permit defendants to apply to the Court of Appeals for a stay pending appeal.

Plaintiffs' Order to Show Cause Dated October 18, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

Upon the Affidavit of Michael B. Mushlin, attorney for plaintiffs, the exhibits attached thereto, and upon all the proceedings had herein, it is

ORDERED, that defendants or their attorneys show cause on the 25th day of October, 1974 at 10:30 o'clock in the forenoon of that day to this Court in Courtroom 8 at the United States District Courthouse, 225 Cadman Plaza East, Brooklyn, New York, WHY an order should not be granted, adjudging defendants in contempt for failure to implement the Court's Judgment entered on October 2, 1974, granting such further relief as may be necessary to bring defendants into compliance with the Court's Judgment, and granting such other and different relief as may be just and proper, and it is further

ORDERED that service of a copy of this order and the papers upon which it is granted on the Hon. Adrian P. Burke, Corporation Counsel of the City of New York, defendants' attorney, on or before 5 o'clock on the 18th day of October, 1974 shall be sufficient service of this order.

ORRIN JUDD
United States District Judge

Dated: October 18, 1974
Brooklyn, New York

Affidavit of Michael B. Mushlin Dated October 18, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MICHAEL B. MUSHLIN, being duly sworn deposes and says:

1. I am staff counsel with the Legal Aid Society Prisoners' Rights Project and am one of the attorneys for plaintiffs in the above-titled cases.

2. I submit this affidavit in support of plaintiffs' motion pursuant to F. R. Civ. P. 70 for an order adjudging defendants in contempt for failure to implement the Judgment of the Court entered on October 2, 1974.

3. The Judgment of the Court, a copy of which is attached hereto as exhibit "A", provides *inter alia*, that "counting from September 1, 1974 no person shall be confined in a cell with another person for a period longer than thirty days unless on the voluntary written consent of both persons." The Judgment further specifies that the "operation of this order be stayed for seven days to permit defendants to apply to the Court of Appeals for a stay pending appeal.

4. Although the Judgment was entered over two weeks ago, and although the stay granted by the Court expired nine days ago, defendants have failed to seek a stay pending appeal from the Court of Appeals. While the Judgment of the Court is fully operative, defendants, in open

violation of its provisions, continue to involuntarily double cell those persons who have been detained in the Brooklyn and Queens Houses of Detention for over thirty days. Attached hereto as Exhibit "B" are affidavits from detainees of both the Brooklyn and Queens institutions attesting to the defendants' violation of the Court's Judgment.

5. Because of defendant's violation of the Court's Judgment, plaintiffs who have been confined for more than thirty days to the Brooklyn and Queens Houses of Detention, but who are being double celled against their will, are being deprived of an important constitutional right.

6. No prior application for the relief herein requested has been made.

7. This motion is being brought by order to show cause rather than notice of motion because of the great harm which is done every day to plaintiffs by defendants' willful and knowing violation of the Court's Judgment.

WHEREFORE, it is respectfully requested that the Court issue an order pursuant to F. R. Civ. P. 70 adjudging defendants in contempt for failure to implement the Court's Judgment, granting such relief as may be necessary to bring defendants into compliance with the Courts Judgment, and granting such other further and different relief as may be just and proper.

[Sworn to by Michael B. Mushlin on October 18, 1974]

EXHIBIT "A" ANNEXED TO AFFIDAVIT OF MICHAEL B. MUSHLIN

Same as Judgment of District Court, October 2, 1974. Printed herein at pages 920a-922a.

EXHIBIT B ANNEXED TO AFFIDAVIT OF
MICHAEL B. MUSHLIN—
AFFIDAVIT OF JOHN BOLAND

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

70 C 1360

RALPH VALVANO, *et al.*,

Plaintiffs,

—against—

BENJAMIN MALCOLM, *et al.*,

Defendants.

73 C 261

DETAINEES OF THE BROOKLYN HOUSE OF DETENTION, *et al.*,

Plaintiffs,

—against—

BENJAMIN MALCOLM, *et al.*,

Defendants.

AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

JOHN BOLAND, being duly sworn deposes and says:

1. I am presently being detained in the Queens House of Detention, having been confined here since June 1, 1973.

Exhibit B

2. I have just been informed that a Judgment entered by this Court provides that after 30 days confinement in this House of Detention a detainee may not be involuntarily confined with another person in one cell.

3. Although I have been detained in this House of Detention for over 30 days, I am still being confined in a cell with another man. Moreover, I am being subjected to double cell confinement without my consent.

4. No one in the New York City Department of Correction has advised me of my right to not be crowded into a cell with another person, nor have I consented in writing to such confinement.

WHEREFORE, your deponent respectfully requests that he be released forthwith from the double cell confinement to which he is currently being subjected.

[Sworn to by John Boland on October 17, 1974]

Affidavit of Anthony Franciotti Dated October 17, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

ANTHONY FRANCIOTTI, being duly sworn deposes and says:

1. I am presently being detained in the Queens House of Detention, having been confined here since June 14, 1974.

2. I have just been informed that a Judgment entered by this Court provides that after 30 days confinement in this House of Detention a detainee may not be involuntarily confined with another person in one cell.

3. Although I have been detained in this House of Detention for over 30 days, I am still being confined in a cell with another man. Moreover, I am being subjected to double cell confinement without my consent.

4. No one in the New York City Department of Correction has advised me of my right to not be crowded into a cell with another person, nor have I consented in writing to such confinement.

WHEREFORE, your deponent respectfully requests that he be released forthwith from the double cell confinement to which he is currently being subjected.

[Sworn to by Anthony Franciotti on October 17, 1974]

Affidavit of Calvin Dorsey Dated October 17, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

CALVIN DORSEY, being duly sworn deposes and says:

1. I am presently being detained in the Queens House of Detention, having been confined here since February 16, 1974.

2. I have just been informed that a Judgment entered by this Court provides that after 30 days confinement in this House of Detention a detainee may not be involuntarily confined with another person in one cell.

3. Although I have been detained in this House of Detention for over 30 days, I am still being confined in a cell with another man. Moreover, I am being subjected to doube cell confinement without my consent.

4. No one in the New York City Department of Correction has advised me of my right to not be crowded into a cell with another person, nor have I consented in writing to such confinement.

WHEREFORE, your deponent respectfully requests that he be released forthwith from the double cell confinement to which he is currently being subjected.

[Sworn to by Calvin Dorsey on October 17, 1974]

Affidavit of William Rose

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

WILLIAM ROSE, being duly sworn deposes and says:

1. I am presently being detained in the Brooklyn House of Detention, having been confined here since March 26, 1974.

2. I have just been informed that a Judgment entered by this Court provides that after 30 days confinement in this House of Detention a detainee may not be involuntarily confined with another person in one cell.

3. Although I have been detained in this House of Detention for over 30 days, I am still being confined in a cell with another man. Moreover, I am being subjected to double cell confinement without my consent.

4. No one in the New York City Department of Correction has advised me of my right to not be crowded into a cell with another person, nor have I consented in writing to such confinement.

WHEREFORE, your deponent respectfully requests that he be released forthwith from the double cell confinement to which he is currently being subjected.

[Sworn to by William Rose]

Affidavit of William Green Dated October 18, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

WILLIAM GREEN, being duly sworn deposes and says:

1. I am presently being detained in the Brooklyn House of Detention, having been confined here since February 11, 1974.

2. I have just been informed that a Judgment entered by this Court provides that after 30 days confinement in this House of Detention a detainee may not be involuntarily confined with another person in one cell.

3. Although I have been detained in this House of Detention for over 30 days, I am still being confined in a cell with another man. Moreover, I am being subjected to double cell confinement without my consent.

4. No one in the New York City Department of Correction has advised me of my right to not be crowded into a cell with another person, nor have I consented in writing to such confinement.

WHEREFORE, your deponent respectfully requests that he be released forthwith from the double cell confinement to which he is currently being subjected.

[Sworn to by William Green on October 18, 1974]

Affidavit of Donald J. Tobias in Opposition Dated October 24, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DONALD J. TOBIAS, being duly sworn, deposes and says that

1. He is an Assistant in the office of Adrian P. Burke, Corporation Counsel of the City of New York, attorney for the City defendants in the above captioned matter. Deponent submits this affidavit in opposition to the motion, made pursuant to FRCP 70, in which plaintiffs seek an order holding the defendants in contempt of the judgment of this Court, dated October 2, 1974.

2. On July 31, 1974, this Court entered a judgment which, with certain limited exceptions, called for the elimination of involuntary double celling at the Brooklyn and Queens Houses of Detention by March 1, 1974. In addition, the judgment of July 31, 1974 stated that as of September 1, 1974 the aforementioned institution could not utilize double celling in cases where inmates had been involuntarily double celled for period in excess of 30 days.

2a. Also, this judgment granted to the defendant a seven day stay in which to seek a further stay, pending appeal, from the Court of Appeals.

3. Thus, the judgment of this Court, as promulgated in July 31, 1974, afforded the defendants a period in excess of five weeks in which to commence their compliance with the Court's directives.

4. Within 10 days after the entrance of the July 31st 1974 judgment, both the plaintiffs and defendants filed motions to amend and correct said judgment, thereby rendering said judgment non-final.

5. In making their motions to amend the July 31, 1974 judgment, the defendants moved for, and obtained a stay of the effectiveness of said judgment pending the disposition of the Rule 59 and 60 motions that had been filed by both sides.

6. This Court heard the aforementioned post-trial motions on the 27th day of September, 1974. A second judgment was entered on October 2, 1974. Said judgment, which substantially changed the judgment dated July 31, 1974, required the defendants to commence their compliance, nunc pro tunc, on September 1, 1974.

7. While the judgment of October 2, 1974, allowed the defendants a seven day period in which to apply to the Circuit Court of Appeal for a stay pending appeal, said period was insufficient to enable the defendant to make a thorough analysis of their ability to comply with the October 2, 1974 judgment or to make an analysis of their long range housing requirements. In order to reach said conclusions, the defendants must survey each institution and ascertain how many inmates 1) prefer double cell oc-

cupancy and 2) have been double celled in excess of 30 days. And only after examining these figures can the defendants determine whether, in view of the departments housing limitations, an application for a stay by the Court of Appeals is mandated.

8. While the original judgment afforded the defendants over five weeks to perform such tasks, the nunc pro tunc effect of the October 2nd judgment gave the defendants only seven days to accomplish said surveys. The department is proceeding with all possible speed, and anticipates that within the next few days, inmate institutions, who have been involuntarily housed in double occupied cells will be moved to single cells in QHD and BHD to the fullest extent possible. At such point the defendants, who have already filed their notice of appeal, will be in a position to determine to what extent further judicial relief will be necessary.

WHEREFORE, the motion should be denied in all respects.

[Sworn to by Donald J. Tobias on October 24, 1974]

Supplementary Affidavit of Donald J. Tobias

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DONALD J. TOBIAS, being duly sworn, deposes and says that:

1. He is an Assistant in the office of Adrian P. Burke, Corporation Counsel of the City of New York. Deponent submits this supplementary affidavit in opposition to plaintiffs' motion, made pursuant to FRCP Rule 70. This supplementary affidavit is based on information supplied to this office on October 23, 1974, and is submitted in an effort to apprise this Court of the Departments most recent housing patterns.

2. This affidavit will apprise this Court of the total number of cells available for use by detainees and will compare said figures with the most recent inmate population figures. It should be borne in mind, however, that the figures to be stated in this affidavit do not reflect the figures representing cell under utilization created by inmate classification. Thus, in every institution, because particular floors are used for designated purposes, many floors within the particular institutions contain significant numbers of cells which, though operative, are not utilized. For example, inasmuch as the numbers of inmates using the

methadone detoxification, mental observation, administrative segregation areas fluctuate significantly, cells in such areas are often not utilized, thus considerably limiting an institution's absolute capacity. At the present time, the Department of Correction is conducting a study to ascertain the numbers of cells necessarily non-utilized as a result of legitimate classification practices.

3. While this affidavit then, shall not consider the reduced numbers of available cells caused by classification efforts, it is abundantly clear that even without considering such data (which, as stated, does in fact significantly reduce an institutions capacity) the Department of Corrections, at the present time, does not have the facilities necessary to provide all inmates in BHD and QHD with single occupied cells.

4. The Department possesses six facilities available to house male detainees. Said facilities are as follows: The New York City House of Detention for Men (Rikers Island), The Bronx House of Detention for Men, The Brooklyn House of Detention for Men, The Queens House of Detention for Men, The Manhattan House of Detention for Men, and Branch Queens House of Detention for Men. And, in addition, the department has 800 spaces available at the Ossining Correctional Facility for use, in appropriate cases, by male detainees.

5. The New York City House of Detention for Men (located at Rikers Island) had, as of September 1, 1973, 1316 operative cells. The census at that institution, as of October 23, 1974 was 1299 inmates. Inasmuch as classification has reduced the number of cellls that can be utilized

on a daily basis (by a figure far greater than 17 cells) this institution, presently the City's only detention overflow facility, utilizes double cell occupancy.

6. The Bronx House of Detention for Men has the capacity for 465 inmates if computed on a single cell basis. As of last September 1, 1974, inoperative cells resulted in said capacity being reduced to 447 inmates. The census at that institution, as of October 23, 1974, was 430 inmates. Inmate classification has further reduced the single cell capacity well below the 447 figure.

7. As of September 30, 1974, the Brooklyn House of Detention had 153 inmates housed in doubly occupied cells. As of that date, 328 inmates were doubly celled in the Queens House of Detention for Men.

8. It is clear, however, that at the present time the Department lacks the facilities to fully comply with the Court's order. Branch Queens House of Detention is scheduled to close within the next few weeks. The Manhattan House of Detention has been ordered to close by a Federal Court (but remains operative under the terms of a limited stay granted by the Court of Appeals). Neither the New York City House of Detention for Men, nor the Bronx House of Detention for Men presently have the additional cell space to accommodate the inmates doubly celled in the Brooklyn and Queens Houses. The space utilized by the Department of Correction at the Ossining facility is limited to a special class of 800 inmates, whose trial status allows them to be eligible for such placement (e.g. inmates whose cases have been adjourned for considerable periods of time, inmates awaiting sentence, etc.).

Supplementary Affidavit of Donald J. Tobias

9. Thus, while the defendants are presently making an effort to comply with this Court's order to the fullest extent possible, and are in the process of compiling information required by this Court's order, to wit, which inmates prefer to be housed in doubly occupied cells and how many inmates have been so housed for over 30 days, it is apparent that the Department, in any event lacks the facilities to fully effectuate this order.

10. And, while the defendants have not completed the fact finding necessary to make an application to be relieved from the order of this Court, it is clear that in light of the physical limitations confronting the defendants, as well as the short period that has elapsed since the promulgation of the order of October 2, 1974, the motion to hold the defendants in contempt is in all ways inappropriate and should be denied.

WHEREFORE, the motion should be denied in all respects.

Reply Affidavit of Michael B. Mushlin
Dated November 1, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MICHAEL B. MUSHLIN, being duly sworn deposes and says:

1. I am staff counsel with the Legal Aid Society, Prisoners' Rights Project and am one of the attorneys for plaintiffs in the above-titled cases.

2. I submit this affidavit in support of plaintiffs' motion for an order adjudging defendants in contempt and granting such relief as may be necessary to bring defendants into compliance with this court's judgment of October 2, 1974.

3. On October 24, 1974 this court heard oral argument on plaintiffs' motion and, following defendants' representation that "defendants are presently making an effort to comply with this court's order to the fullest extent possible" (Supplemental Affidavit of Donald J. Tobias, ¶9), adjourned the hearing to November 1st in order to ascertain the extent of defendants' compliance at that time.

4. Submitted herewith are affidavits from Anthony Franciotti, a detainee at the Queens House of Detention,

and Erol Vural, an employee of the New York City Board of Correction, detailing defendants' actions of the past week with respect to this court's judgment.

5. It is apparent from these affidavits that, in a number of critical aspects, defendants' efforts fall far short of compliance with this court's judgment.

6. First, and most importantly, because of fear of being transferred to double cell housing at another institution, plaintiffs have been prevented from exercising a voluntary choice to be housed in single cell. (See affidavit of Anthony Franciotti attached hereto).

That this fear is realistic is attested to by the affidavits submitted by defendants following this court's decision of July 31, 1974, which reveal that the city plans to implement this court's judgment by overcrowding other institutions, specifically the New York City House of Detention for Men, the facility to which detainees from Brooklyn and Queens are presently being transferred, and which presently utilizes double cell occupancy. (See, Affidavit of Benjamin Malcolm in support of defendants' motion to amend judgment, ¶11; Supplemental Affidavit of Donald J. Tobias in opposition to plaintiffs' motion for a finding of contempt, ¶5).

Unless plaintiffs are assured that the consequence of their choosing to be housed in a single cell in Brooklyn and Queens will not be transfer to yet another double cell—this time at another institution—it will be impossible for plaintiffs to exercise the free and voluntary choice which this court's order guarantees to them.

7. Second, the suggestive and uninformative manner in which defendants distributed consent forms to plaintiffs (see Affidavit of Erol Vural attached hereto) completely obviates the knowing and voluntary nature of the consents actually gathered.

8. To rectify these shortcomings and to assure defendants' compliance with the judgment, plaintiffs propose that this court issue a notice to all persons in the Brooklyn and Queens Houses fully explaining to them their rights under the order of October 2, 1974.

9. Plaintiffs have drafted a proposed notice to the class which is attached hereto. The notice explains to plaintiffs their rights under this court's judgment, indicates that they may not be punished for asserting their right to a single cell by transfer to another institution, and identifies plaintiffs' counsel. As these cases have been declared to be class actions, such a notice is clearly proper under Rule 23(d)(2) which empowers the court to issue such notices as may be proper for protection of the members of the class.

10. This notice, followed by swift implementation of the court's judgment by defendants, will assure that plaintiffs are actually granted the relief which this court has held they are entitled. It cannot, however, excuse defendants' complete failure to take any steps whatever to obey this court's judgment until plaintiffs were forced to seek relief from this court. Such knowing indifference to the constitutional rights of others can only be remedied by a finding by this court that defendants have been in contempt.

Reply Affidavit of Michael B. Mushlin

WHEREFORE, plaintiffs respectfully request that this court issue an order adjudging defendants in contempt of court for failure to implement this court's judgment of October 2, 1974, and ordering that defendants forthwith issue to plaintiff class this court's notice of the judgment of October 2, 1974 explaining to plaintiffs their rights under this court's judgment, indicating that they may not be punished for asserting their right to a single cell by transfer to another institution where they will be double-celled, and identifying plaintiffs' counsel, and that this court grant such other relief as may be just and proper.

[Sworn to by Michael B. Mushlin on November 1, 1974]

Affidavit of Anthony Franciotti Dated October 30, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

ANTHONY FRANCIOTTI, being duly sworn, deposes and says:

1. I am a detainee at the Queens House of Detention where I am an elected representative on the inmate liaison committee.

2. On or about October 23, 1974, I and other members of the liaison committee were called together to meet with Assistant Deputy Warden Raymond Gibbons regarding a survey of the detainee population that was planned by the Department of Corrections.

3. At the meeting we were informed that the survey would take place on October 26, 1974 when forms would be distributed to detainees for them to indicate their preference for either single or double cell occupancy. I and other liaison committee members thereupon addressed a number of inquiries to Assistant Deputy Warden Gibbons concerning this survey. We inquired, for example, whether detainees who indicated a preference for single cell occu-

pancy would, because of their choice, be transferred to another institution where they would be double-celled. Assistant Deputy Warden Gibbons replied with words to this effect: "We are not ruling out that possibility. It is a possibility that we may have to consider."

4. Following the liaison committee meeting, and prior to the survey, I arranged for a meeting of all the detainees on my housing floor to inform them of what would be transpiring. At that meeting many detainees who were double-celled and, who would prefer single cell confinement, voiced concern that by choosing to be in a single cell they might be transferred to Rikers Island where they would be housed in double cell in the New York House of Detention for Men.

5. When the survey was actually conducted on October 26th, and the consent forms (attached hereto) were distributed, I know that many detainees consented to double cell confinement at the Queens House of Detention because of fear that if they choose single cell occupancy they would be transferred to a double cell at another institution. Because of this fact, detainees were not, in fact, allowed to exercise a voluntary choice as to their housing preference.

[Sworn to by Anthony Franciotti on October 30, 1974]

EXHIBIT ANNEXED TO AFFIDAVIT OF
ANTHONY FRANCIOTTI

Date: _____

INMATE'S NAME:_____

TO : Warden, Queens House of Detention

SUBJECT : OPTIONAL HOUSING

A judgement has been handed down by Judge Orrin G. Judd wherein you have the option to elect to be confined in single or double cell occupancy.

In accordance with this judgement you are to indicate by check (✓) mark, how you wish to be housed:

CHECK ONE:

SINGLE OCCUPANCY ( )

DOUBLE OCCUPANCY ( )

Inmate Signature _____

Book and Case No.: _____

Cell location:

Witnessed by:

Affidavit of Erol Vural Dated October 30, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

EROL VURAL, being duly sworn deposes and says:

1. I am a second year law student at Rutgers University and am employed on a part time basis by the New York City Board of Correction as a college aid in the Investigations and Reporting Unit.

2. I was asked by the Board of Correction to be present at the Brooklyn House of Detention on October 26, 1974 to observe a survey of the detainee population of the institution which was being undertaken by the Department of Corrections at that time. I was informed that the purpose of the survey was to ascertain the identity of those detainees who sought to be housed in a double cell and to obtain from them their written consent to such housing.

3. I arrived at the Brooklyn House of Detention at approximately one o'clock in the afternoon on October 26th and remained in the institution for approximately one and a half hours thereafter. During this time I spoke with Assistant Deputy Warden Guzman, the officer in charge of the survey, Officer Diaz, his subordinate, and other correction officers actually engaged in the survey. In addition,

I visited four housing floors in the institution and actually observed the survey taking place on one of those floors. In all, I personally observed approximately forty interviews.

4. From my observation the survey of the population was conducted in the following manner:

A correction officer would approach a cell in which detainees were housed and if the cell contained two detainees, would use words to this effect "you men are in a double cell do you want to consent to that?" Thereupon, the officer would offer the detainees a form entitled "double cell occupancy consent" (attached hereto) for their signature. Similarly, if detainees were single-celled the officer would inquire whether the detainee wished to remain in that status.

At no time did I observe the officers explain to the detainees orally that under a Federal Court Order certain persons were entitled to be housed in a single cell. I furthermore observed that the officers did not appear to possess sufficient knowledge of the court's order, or the department's policy with regard to the order to meaningfully respond to inquiries made to them by detainees about the order.

[Sworn to by Erol Vural on October 30, 1974]

EXHIBIT ANNEXED TO AFFIDAVIT OF EROL VURAL

BROOKLYN HOUSE OF DETENTION FOR MEN
275 ATLANTIC AVE. BKLYN, N.Y.

DATE :

FROM :

TO : WARDEN, BROOKLYN HOUSE OF DETENTION

SUBJECT : DOUBLED CELL OCCUPANCY CONSENT

1. I herewith request permission to live in a double occupancy cell. I fully understand that, under a Federal Court decision, I have the right to single cell occupancy while housed in the Brooklyn House of Detention. I wish to forego that right and be permitted to have a cell partner.

_____
Inmate's Name Number

Witnessed: _____

Date: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RALPH VALVANO, et al.,	:	
Plaintiffs,	:	
-against-	:	Docket No. 70 C 1390
BENJAMIN MALCOLM, et al.,	:	
Defendants.	:	
DETAINEES OF THE BROOKLYN HOUSE OF DETENTION, et al.,	:	
Plaintiffs,	:	
-against-	:	Docket No. 73-261
BENJAMIN MALCOLM, et al.,	:	
Defendants.	:	

NOTICE TO ALL PERSONS CONFINED IN
THE BROOKLYN HOUSE OF DETENTION
AND THE QUEENS HOUSE OF DETENTION

The United States District Court, Hon. Orrin G. Judd, has ordered that if you have been confined in this institution for more than thirty days, the Department of Correction may not confine you in a cell with another person unless both of you voluntarily consent, in writing, to being double-celled.

The Department of Correction may not punish you in any manner or take away any of your privileges for choosing to occupy a cell by yourself.

If you choose to live in a cell by yourself, the Department cannot make you share a cell with another inmate in this or any other institution.

If, after thirty days, you wish to remain double-celled, you should inform the warden in writing by sending him an interview slip.

If you wish to write to the attorneys for the detainees in these cases concerning this order, address your letter to Michael B. Mushlin or Steven A. Herman, Esq., Prisoners' Rights Project, Legal Aid Society, 15 Park Row, New York, New York 10038.

This notice must remain where it is posted. Do not remove it.

Affidavit of Salvatore Latorre, Warden, Queens House of Detention

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

SALVATORE LATORRE, being duly sworn, deposes and says that:

1. He is Warden of the Queens House of Detention for Men. Deponent submits this affidavit pursuant to instructions of this Court, communicated to Counsel for defendants on October 24, 1974. Deponent also submits this affidavit in opposition to plaintiffs' motion for an order holding the defendants in the above encaptioned matter in civil contempt.

2. The personnel under my command have surveyed the entire detention population in order to ascertain the number of inmates who have been housed in doubly occupied cells in the institution for periods in excess of 30 days to determine which inmates consent to placement in doubly occupied cells.

3. As a result of these surveys and the actions taken by this command, this institution is presently in full compliance with the order of this Court, dated October 2, 1974.

WHEREFORE, the motion should be dismissed in all respects.

Affidavit of Theodore West, Warden, Brooklyn House of Detention

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

THEODORE WEST, being duly sworn, deposes and says that:

1. He is Warden of the Brooklyn House of Detention for Men. Deponent submits this affidavit pursuant to instructions of this Court, communicated to Counsel for defendants on October 24, 1974. Deponent also submits this affidavit in opposition to plaintiffs' motion for an order holding the defendants in the above encaptioned matter in civil contempt.

2. The personnel under my command have surveyed the entire detention population in order to ascertain the number of inmates who have been housed in doubly occupied cells in the institution for periods in excess of 30 days to determine which inmates consent to placement in doubly occupied cells.

3. As a result of these surveys and the actions taken by this command, this institution is presently in full compliance with the order of this Court, dated October 2, 1974.

WHEREFORE, the motion should be dismissed in all respects.

Order of District Court Dated November 1, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

The plaintiffs in these actions having moved the Court for an order effectuating defendant compliance with the Court's Judgment of October 2, 1974, and the Court having determined that compliance with the Court's Judgment will be furthered by notice of the Court's Judgment of October 2, 1974 to all members of the plaintiff class and the court having further determined that such notice is necessary for the protection of the members of the class, it is

ORDERED, that notice of the Court's Judgment be given to each person detained in the Brooklyn House of Detention and the Queens House of Detention by distributing a written copy of the following notice by hand to each detainee and by posting a copy in a plainly visible public place on each tier of the Brooklyn House of Detention and the Queens House of Detention on which detainees are housed:

NOTICE TO ALL PERSONS CONFINED IN THE BROOKLYN HOUSE OF DETENTION AND THE QUEENS HOUSE OF DETENTION

The United States District Court, Hon. Orrin G. Judd, has ordered that if you have been confined in this institution for more than thirty days, the Department of Cor-

rection may not confine you in a cell with another person unless both of you voluntarily consent, in writing, to being double-celled, and then any such consent may be revoked after another thirty days.

The Department of Correction may not punish you in any manner or take away any of your privileges for choosing to occupy a cell by yourself.

If you choose to live in a cell by yourself, the Department cannot make you share a cell with another inmate in this or any other institution.

If you wish to write to the attorneys for the detainees in these cases concerning this order, address your letter to Michael B. Mushlin or Steven A Herman, Esq., Prisoners' Rights Project, Legal Aid Society, 15 Park Row, New York, New York 10038.

This notice must remain where it is posted. Do not remove it; and it is further,

ORDERED, that the Legal Aid Society reproduce the necessary copies of the above notice and deliver them to the Warden of the Brooklyn House of Detention and to the Warden of the Queens House of Detention for distribution; and it is further

ORDERED, that the Warden of the Brooklyn House of Detention, and the Warden of the Queens House of Detention shall cause a copy of the above notice to be distributed by hand, to each detainee presently in the institution and to other detainees upon admittance to the institution, and to be posted in a plainly visible public place on each tier in

which detainees are housed in the above institutions, and it is further

ORDERED, that defendants shall notify plaintiffs' counsel in writing when said distribution of the notice to plaintiff class is completed.

Dated: Brooklyn, New York
November 1, 1974

ORRIN G. JUDD
United States District Judge

Memorandum and Order of District Court
Dated November 15, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

Appearances:

WILLIAM E. HELLERSTEIN, Esq.
JOEL BERGER, Esq.
STEVEN A. HERMAN, Esq.
MICHAEL B. MUSHLIN, Esq.
Attorneys for Plaintiffs

HON. ADRIAN P. BURKE
Corporation Counsel,
City of New York
Attorney for City Defendants

By: DONALD J. TOBIAS, Esq.
Assistant Corporation Counsel
of Counsel

JUDD, J.

MEMORANDUM AND ORDER
(Motion for Contempt)

Plaintiffs have moved to find the defendants in contempt for failure to comply with the portions of this court's order

entered July 21, 1974, as amended on October 2, 1974, which require that "counting from September 1, 1974 no person shall be confined in a cell with another person for a period longer than thirty days unless on the voluntary written consent of both persons".

Facts

The plaintiffs assert that double celling continues unabated at both Brooklyn House of Detention for Men (BHD) and Queens House of Detention for Men (QHD). Defendants respond that they are in conformity with this court's judgment because they have obtained the voluntary written consent of all inmates who have presently been double celled for more than thirty days and that no one in either facility has been in a cell with another man for more than thirty days without such written consent.

Plaintiffs reply that the consents to which the defendants point were not really voluntary. They assert in the first place, that the consents were impelled by fear that refusal would simply result in transfer to a more distant institution where they would still be double celled. In the second place, they assert that the manner in which the consents were obtained was inherently coercive.

The form used at BHD in a survey of the detainee population undertaken on October 26, 1974 stated:

> I herewith request permission to live in a double occupancy cell. I fully understand that, under a Federal court decision, I have the right to single cell occupancy while housed in the Brooklyn House of Detention. I wish to forego that right and be permitted to have a cell partner.

It appears that a correction officer would approach a cell in which detainees were housed and if the cell contained two detainees would say words to the effect, "you men are in a double cell, do you want to consent to that?" Thereupon, the officer would hand the form to the detainees for their signature. There was no oral explanation of the right to be housed in a single cell and no evidence that the officers had been given detailed knowledge of the court's order or the department's policy with regard to the order, so that they could respond meaningfully to inquiries about it.

The form used at QHD read:

> A judgment has been handed down by Judge Orrin G. Judd wherein you have the option to elect to be confined in single or double cell occupancy.
>
> In accordance with this judgment, you are to indicate by check (√) mark how you wish to be housed:
>
> CHECK ONE: SINGLE OCCUPANCY ( )
> DOUBLE OCCUPANCY ( )

Before the survey at QHD one of the members of the inmates liaison committee inquired whether persons who indicated a preference for single-cell occupancy would be transferred to another institution where they would be double celled. An Assistant Deputy Warden replied in effect:

> We are not ruling out that possibility. It is a possibility that we may have to consider.

When the liaison committee reported to detainees who were double celled, and would prefer single cell confinement,

they voiced concern that a choice for a single cell might result in a transfer to the New York House of Detention for Men at Rikers Island and being housed there in double cells.

The provision in this court's order to permit continued occupancy of standard cells by two men on voluntary consent was not intended to permit easy evasion of this court's factual conclusion that double celling was dehumanizing. The provision simply recognized the professional opinion of certain witnesses that *some* inmates preferred not to be alone in a cell.

The court recognizes the pressures of numbers at BHD and QHD, especially in light of the Court of Appeals' opinion in *Wallace* v. *Kern,* 499 F.2d 1345, holding that a federal court may not put an overall limit on the length of pre-trial confinement. The court also recognizes that some inmates at BHD and QHD may have to be moved to less accessible facilities in order to achieve single-cell housing. A man's desire to be near his family, friends and lawyer may be a reason for consenting for a while to improper housing. The choice should not, however, be between double-celled housing at BHD and QHD and double-celled housing at the place of transfer.

If the number of requests for single cells exceeds the single cells available elsewhere, the remedy is for the warden to notify the courts that the institutions are at capacity. The courts may then be able to release inmates who face the least serious charges and present the least likelihood of absconding, in order to assure a "tolerable living environment" for those who must be confined.

Plaintiffs had not sought the aid of the court in the implementation of the order against double celling before the

surveys were made at BHD and QHD, or before the motion for contempt was brought. It was only at the time of the hearing on the contempt motion that any provision was requested for giving the inmate clear notice of the rights afforded them under this court's order. A notice has been submitted and approved with a direction that it be distributed to the inmates and posted, Order of November 6, 1974.

There is no question that the court would have power to hold defendants in contempt, even though they are public officials, and that one sanction for contempt would be money fines. 18 USC § 401; *Landman* v. *Royster,* 354 F. Supp. 1292, 1300 (E.D. Va. 1973); *Hamilton* v. *Love,* 358 F. Supp. 338 (E.D. Ark. 1973); *Jones* v. *Wittenberg,* 357 F. Supp. 696 (N.D. Ohio 1973). However, the court does not find that there has been any deliberate violation of its order by the defendants. Any question of coercion in obtaining consent may be obviated by letting inmates reconsider their choices.

Consents heretofore obtained should not be regarded as permanent. A man who has consented to double cell occupancy should have the right after another thirty days to request a transfer to a single cell with the assurance (a) that he will not be penalized in any way for making such a request and (b) that if he is transferred to another institution he will not be placed in a standard cell with another man.

A revision of the form of notice heretofore approved should be made in order to incorporate the provisions set forth above. The plaintiff is directed to settle an order in accordance with this memorandum, with a revised form of notice, on three days' notice to defendants' attorneys.

ORRIN G. JUDD
U.S.D.J.

Order of District Court Dated December 9, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLES]

This matter having come before the Court on plaintiffs' motion to have defendants held in contempt of the Court's Judgment of October 2, 1974, and the Court having heard both sides in opposition and in support of the said motion, and the Court having read and considered all papers filed in connection with the said motion and having made Findings of Fact in a Memorandum and Order dated November 15, 1974 that defendants have not deliberately violated its Judgment of October 2, 1974, but that in order to protect the plaintiff class to insure that all consents by plaintiffs to double-celling pursuant to the Court's Judgment of October 2, 1974, are voluntary it is necessary to revise the Notice to the Class heretofore ordered by the Court in its Order of November 6, 1974, it is hereby

ORDERED that plaintiffs' motion to hold defendants in contempt of the Court's Judgment of October 2, 1974, is denied at this time without prejudice and it is further,

ORDERED that the notice to the class of the Court's Judgment of November 6, 1974 be revised to read as follows:

Order of District Court

NOTICE TO ALL PERSONS CONFINED IN THE BROOKLYN HOUSE OF DETENTION AND THE QUEENS HOUSE OF DETENTION

The United States District Court, Hon. Orrin G. Judd, has ordered that if you have been confined in this institution for more than thirty days, the Department of Correction may not confine you in a cell with another person unless both of you voluntarily consent in writing to being double-celled.

Any person who at any time consents or has consented to double-celling has the right thirty days after consenting to revoke his consent.

The Department of Correction may not punish you in any manner or take away any of your privileges for choosing to occupy a cell by yourself.

If you choose to live in a cell by yourself, the Department cannot make you share a cell with another inmate in this or any other institution.

If you wish to write to the attorneys for the detainees in these cases concerning this order, address your letter to Michael B. Mushlin or Steven A. Herman, Esqs., Prisoners' Rights Project, Legal Aid Society, 15 Park Row, New York, New York 10038.

This notice must remain where it is posted. Do not remove it; and it is further,

ORDERED, that the Legal Aid Society reproduce the necessary copies of the above notice and deliver them to the Warden of the Brooklyn House of Detention and to the

Warden of the Queens House of Detention for distribution; and it is further

ORDERED, that the Warden of the Brooklyn House of Detention, and the Warden of the Queens House of Detention shall cause a copy of the above notice to be distributed by hand to each detainee presently in the institution, and to other detainees upon admittance to the institution, and to be posted in a plainly visible public place on each tier in which detainees are housed in the above institutions, and it is further

ORDERED, that defendants shall notify plaintiffs' counsel in writing when said distribution of the notice to plaintiff class is completed.

Dated: Brooklyn, New York
December 9, 1974

ORRIN G. JUDD
United States District Judge

Notice of Appeal (Queens House of Detention)
Dated October 22, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Docket No. 70-C-1390 (O.G.J.)

RALPH VALVANO, *et al.*,

Plaintiffs,

—against—

BENJAMIN MALCOLM, *et al.*,

Defendants.

SIRS:

NOTICE is hereby given that the defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment entered herein on October 2, 1974.

Yours, etc.

ADRIAN P. BURKE,
Corporation Counsel
of The City of New York
Attorney for Defendants
Office & P. O. Address:
Municipal Building
New York, New York 10007

By CARL SANDERS

To:
WILLIAM E. HELLERSTEIN, Esq.
The Legal Aid Society
Prisoners' Rights Project
Attorney for Plaintiffs
15 Park Row
New York, New York

Notice of Appeal (Brooklyn House of Detention)
Dated October 22, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Docket No. 73-C-261 (O.G.J.)

DETAINEES OF THE BROOKLYN HOUSE OF DETENTION, *et al.*,
Plaintiffs,

—against—

BENJAMIN MALCOLM, *et al.*,
Defendants.

SIRS:

NOTICE is hereby given that the defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment entered herein on October 2, 1974.

Yours, etc.,

ADRIAN P. BURKE
Corporation Counsel of
The City of New York
Attorney for Defendants
Office & P. O. Address:
Municipal Building
New York, New York 10007

By CARL SANDERS

To:
WILLIAM E. HELLERSTEIN, Esq.
The Legal Aid Society
Prisoners' Rights Project
Attorney for Plaintiffs
15 Park Row
New York, New York

Notice of Motion to Consolidate Appeals and to Amend Case Titles Dated November 19, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 74-2427 and 74-2482

UNITED STATES OF AMERICA *ex rel.*, RICHARD JENKINS 9LA12, BARNNARD GRAVES, (5th Floor), LARRY SIMS, 5LA4, JIMMY BROWN, 5LA9, CHRISTOPHER DIAZ, 5LD6, BARRIE PETERS, (7th Floor), DANIEL MOSELEY, (7th Floor), JOHN EVANS, 7LC14, WILLIAM MCCLOUD, 9UB7, MANUEL ALI GRIFFIN, 9UC2, RAYMOND MOCTEZUMA, (6th Floor), FRED FOGGIE, 6UD5, ROBERT SAIZ, 6LD1, GEORGE MITCHELL, (8th Floor), WILLIAM MCDANOLD, 8LA5, RAYMOND JOHNSON, 8UD2,

Plaintiffs-Appellees,

—v.—

HON: BENJAMIN MALCOLM, COMMISSIONER OF THE DEPARTMENT OF CORRECTION: 80 Centre Street, New York, NY; HON: JAMES S. MONROE SUPERINTENDENT OF THE BROOKLYN HOUSE OF DETENTION FOR MEN: 275 ATLANTIC AVE., BROOKLYN, 11201, NY; HON: JOHN LINDSAY, MAYOR OF THE CITY OF NEW YORK, OFFICE OF THE MAYOR, CITY HALL, NY; DEPUTY SUPERINTENDENT: GUZMAN, 275 ATLANTIC AVE., BROOKLYN, NY,

Defendants-Appellants.

Notice of Motion to Consolidate Appeals

RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ABRAHAM D. BEAME, Mayor, City of New York; SALVATORE LATORRE, Warden, Queens House of Detention for Men, individually and in their official capacities,

Defendants-Appellants,

NICHOLAS FERRARO, District Attorney, Queens County,

Defendant.

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of MARK D. LEFKOWITZ, sworn to on November 19, 1974, upon the appellants' notices of appeal filed October 25, 1974 upon completed forms C and D which this Court has required for docketing appeals and upon all other proceedings had herein, the undersigned will move this Court, at a session thereof to be held at the Courthouse, Foley Square, New York, New York, for an order consolidating the two appeals herein, amending the captioned titles to reflect the changes in the names of the litigants, and for such other and further relief as this Court may seem proper. Appellants appeal from a judgment and order of the District Court for the Eastern District of New York (Judd, J.) entered on October 2, 1974.

Notice of Motion to Consolidate Appeals

Dated: New York, New York
November 19, 1974

Yours, etc.,

ADRIAN P. BURKE
Corporation Counsel
Attorney for Appellants
Municipal Building
New York, NY 10007

To:

JOEL BERGER
The Legal Aid Society
15 Park Row
New York, NY 10038

Affidavit of Mark D. Lefkowitz
Dated November 19, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 74-2427, 74-2482

UNITED STATES OF AMERICA *ex rel.* RICHARD JENKINS, 9LA12, BARNARD GRAVES, (5th Floor), LARRY SIMS, 5LA4, JIMMY BROWN, 5LA9, CHRISTOPHER DIAZ, 5LD6, BARRIE PETERS, (7th Floor), DANIEL MOSELEY, (7th Floor), JOHN EVANS, 7LC14, WILLIAM MCCLOUD, 9UB7, MANUEL ALI GRIFFIN, 9UC2, RAYMOND MOCTEZUMA, (6th Floor), FRED FOGGIE, 6UD5, ROBERT SAIZ, 6LD1, GEORGE MITCHELL, (8th Floor), WILLIAM MCDANOLD, 8LA5, RAYMOND JOHNSON, 8UD2,

Plaintiffs-Appellees,

—v.—

HON: BENJAMIN MALCOLM, COMMISSIONER OF THE DEPARTMENT OF CORRECTION: 80 Centre Street, NEW YORK, NY; HON: JAMES S. MONROE, SUPERINTENDENT OF THE BROOKLYN HOUSE OF DETENTION FOR MEN: 275 ATLANTIC AVE., BROOKLYN, 11201, NY; HON: JOHN LINDSAY, MAYOR OF THE CITY OF NEW YORK, OFFICE OF THE MAYOR, CITY HALL, NY; DEPUTY SUPERINTENDENT: GUZMAN, 275 ATLANTIC AVE., BROOKLYN, NY,

Defendants-Appellants.

Affidavit of Mark D. Lefkowitz

RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOM, Commissioner of Correction for the City of New York; ABRAHAM D. BEAME, MAYOR, City of New York; SALVATORE LATORRE, Warden, Queens House of Detention for Men, individually and in their official capacities,

Defendants-Appellants,

NICHOLAS FERRARO, District Attorney, Queens County,

Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MARK D. LEFKOWITZ, being duly sworn, deposes and says:

1. I am an attorney in the Office of the Corporation Counsel of the City of New York, attorney for the appellants.

2. This affidavit is submitted in support of a motion to consolidate the appeals in the above entitled cases and to amend the case titles to reflect changes in the names of the litigants.

Affidavit of Mark D. Lefkowitz

3. The appeals are from a judgment and order of the District Court for the Eastern District of New York (Judd, J.) entered on October 2, 1974. They are class actions brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201 challenging the constitutionality of the conditions under which persons are held in pretrial custody by the City of New York at the Queens and Brooklyn Houses of Detention.

4. A motion to consolidate both cases in the District Court was denied by Judge Judd (order entered on September 7, 1973). However the Court nevertheless consolidated the issues of the two cases for trial.

5. We submit that the basis for consolidation of the appeals herein is that both appeals involve identical issues raised by identical allegations in the complaints, to wit, overcrowding in jail cells and insufficient "lock out" time from jail cell confinement.

6. We also submit that for the convenience of this Court and all parties concerned, it is appropriate, as well as advantageous, to consolidate these appeals.

7. I have spoken with Joel Berger, counsel for appellees and he consents to this motion.

8. Appellants also request that the titles of the Jenkins and Valvano actions be amended to read as follows in order to incorporate the changes in the names of the litigants:

Affidavit of Mark D. Lefkowitz

JENKINS ACTION

Detainees of the Brooklyn House of Detention for Men, RAYMOND MOCTEZUMA, RONALD FOY, LAWRENCE ODOM, FRANK WILLIAMS, individually and on behalf of all other persons similarly situated,

Appellees,

—v.—

BENJAMIN MALCOLM, Commissioner of Correction of the City of New York, THEODORE R. WEST, WARDEN, BROOKLYN HOUSE OF DETENTION FOR MEN, ABRAHAM D. BEAME, MAYOR OF NEW YORK CITY, LOWELL B. BELLIN, Health Commissioner and Health Services Administrator of the City of New York, individually and in their official capacities,

Appellants.

VALVANO ACTION

RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York; ABRAHAM D. BEAME, MAYOR, City of New York; SALVATORE LATORRE, WARDEN, Queens House of Detention for Men, individually and in their official capacities,

Defendants-Appellants,

NICHOLAS FERRARO, District Attorney, Queens County,

Defendant.

WHEREFORE, it is respectfully requested that this Court grant the appellants' application herein.

[Sworn to by Mark D. Lefkowitz on November 19, 1974]

Order of Circuit Court Dated December 3, 1974 Granting Consolidation and Amendment of Case Titles

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 3rd day of December, one thousand nine hundred and 74.

UNITED STATES OF AMERICA, *ex rel.* RICHARD JENKINS, 9LA12, BARNNARD GRAVES, (5th Floor), LARRY SIMS, 5LA4, JIMMY BROWN, 5LA9, CHRISTOPHER DIAZ, 5LD6, BARRIE PETERS, (7th Floor), DANIEL MOSELEY, (7th Floor), JOHN EVANS, 7LC14, WILLIAM MCCLOUD, 9UB7, MANUEL ALI GRIFFIN, 9UC2, RAYMOND MOCTEZUMA, (6th Floor), FRED FOGGIE, 6UD5, ROBERT SAIZ, 6LD1, GEORGE MITCHELL, (8th Floor), WILLIAM MCDONALD, 8LA5, RAYMOND JOHNSON, 8UD2,

Plaintiffs-Appellees,

—v.—

HON. BENJAMIN MALCOLM, Commissioner of the Department of Correction: 80 Centre Street, New York, New York, HON. JAMES S. MONROE, Superintendent of the Brooklyn House of Detention for Men: 275 Atlantic Avenue, Brooklyn, 11201, New York, *et al.,*

Defendants-Appellants.

Order of Circuit Court

It is hereby ordered that the motion made herein by counsel for the appellants dated November 19, 1974 to consolidate the appeal herein (74-2427) with the appeal in Docket #74-2482 and to amend the titles in both appeals be and it hereby is granted.

JAMES L. OAKES
Circuit Judge

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P.K.P.
15 Park Row
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